TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]419

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 8, 1918.

(23,494)

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INDEX.

	Original.	Print
Petition	1	1
Schedule A—Concession of the Spanish Government to the Eastern Extension, Australasia and China Telegraph Co., Ltd., February 22, 1879	7a	4
B Concession from the Spanish Government to the Eastern Extension, Australasia and China Telegraph Co., Ltd., April 14, 1897	30	26
Demurrer	66	53
Argument and submission of demurrer	67	54
Opinion	68	54
Judgment	74	60
Application for and allowance of appeal	75	60
Clerk's certificate	76	61

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1913.

1 Court of Claims.

30767.

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,
against
THE UNITED STATES OF AMERICA.

1. *Petition and Exhibits. Filed Oct. 22, 1910.*

The Claimant, The Eastern Extension, Australasia and China Telegraph Company, Limited, is a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, and as such was authorized to construct, maintain and operate lines of submarine telegraph cables and lines of telegraph in various parts of the world, and particularly in the Far East, Australasia, China and the Philippine Islands.

On or about February 22, 1879, the Claimant secured from the Government of Spain a grant and concession for the establishment and working of a submarine telegraph cable between the Island of Luzon, one of the Philippine Islands, and Hong Kong in China, whereby Manila, on said Island of Luzon, and the Philippine Islands were to be placed in communication with the universal telegraph system, and pursuant to which the Claimant was given an ex-
2 clusive privilege for forty years to maintain cable communication between said points.

Correct translations of said grant and of the documents constituting the same (the originals of which were executed in the Spanish language, and which will be produced on the trial hereof) are hereto annexed and marked Schedule A, and are hereby made a part hereof with the same force and effect as though the same were herein set forth in full.

In conformity with the provisions of said grant and concession the Claimant laid a cable from Hong Kong to Bolinao on the Island of Luzon, whence, by means of land lines constructed on said Island of Luzon telegraph communication was instituted between Manila and Hong Kong, and thence to other parts of the world, and the Claimant has ever since the construction of said cable, except when prevented by causes beyond its control, actually operated, and is still working, the same.

Thereafter and on April 14, 1897, a further concession was granted by the Government of Spain to the Claimant, whereby the Claimant became empowered to construct, establish and work three submarine telegraph cables to communicate the Islands of Luzon, Panay, Negros and Zebu, in the Philippine archipelago.

Correct translations of said concession and of the several documents constituting the same (the originals of which were

executed in the Spanish language, and which will be produced on the trial hereof) and a copy of the conditions of said consession in the Spanish language, are hereto annexed and marked Schedule B, and are hereby made a part hereof with the same force and effect as though the same were herein set forth in full.

3 Among other conditions contained in the said grant and concession are the following:

"Article 9. The Concessionaire undertakes to work, at his own expense and risk, the Cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the Cables and their adjuncts in perfect working order.

"Article 10. The Concessionaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the Cables, the said payments being made at Manila by the Chief Treasury Office of those Islands."

Pursuant to the aforesaid grant and concession, the Claimant duly constructed, established and placed into working order the three submarine telegraph cables specified in said concession between the Islands of Luzon, Panay, Negros and Zebu, and opened the same for traffic in October, 1897, and has ever since maintained and operated them.

On March 30, 1898, a further concession was granted by the Government of Spain to the Claimant, for the establishment and working of a submarine telegraph cable between Hong Kong and Manila, in extension of the cable constructed under authority of the aforesaid grant of February 22, 1879. The extension authorized by said grant of March 30, 1898, was completed in April, 1898.

The Claimant has at all times since the granting of the aforesaid concessions, and of each of them, been ready, able and willing to perform all of the conditions imposed upon it by the terms thereof, and has actually fulfilled and continues to fulfill all of the

4 said conditions; and to perform all of the duties imposed upon it by the terms of the said concessions and each of them.

Prior to December 10, 1898, the Islands of Luzon, Panay, Negros and Zebu, as well as the other Islands of the Philippine Archipelago, constituted territory of the Government of Spain, and were under the absolute jurisdiction of said Government. On that day a treaty was duly entered into between the Government of the United States of America and the Government of Spain, which was signed at Paris, France, and was thereafter duly ratified, whereby the Government of Spain ceded to the United States of America the archipelago known as the Philippine Islands, including the Islands of Luzon, Panay, Negros and Zebu, in consideration of which the United States of America agreed to pay, and subsequently paid, to the Government of Spain the sum of $20,000,000; and pursuant to said cession the United States of America acquired title to and absolute jurisdiction over said Philippine Islands and over the Islands of Luzon, Panay, Negros and Zebu, and the full right of sovereignty over said Islands, and all of the rights and obligations of the Government of Spain with respect thereto ceased.

Thereupon the United States of America entered into the occupancy of said Philippine Islands, and proceeded to exercise sovereignty over said Islands and of the inhabitants thereof, and to assume jurisdiction and control over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed and operated by the Claimant, and availed itself of all of the bene-
5 fits and advantages thereof, using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do, and it has become in all respects the successor of the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concessions, respectfully referred to as Schedules A and B.

By reason of the premises the United States of America assumed all of the obligations and the performance of all of the conditions accepted by the Government of Spain and agreed to by it according to the terms of the aforesaid concessions Schedules A and B, and of each of them, and agreed with the Claimant to perform the covenants and agreements, and to fulfill the conditions, set forth in said several concessions and accepted and agreed to by the Government of Spain.

The United States of America has failed to perform said agreements and to fulfill the said conditions, in that it has failed and refused to pay to the Claimant the annual subsidy of £4,500 sterling as required by the terms of Article 10 of the aforesaid concession hereinbefore referred to as Schedule B, for the years 1905, 1906, 1907, 1908 and 1909, and for each of said years, and by reason of such failure and refusal to pay it has become indebted to the Claimant in the sum of £4,500 sterling for each of said years, with interest on each of said annual instalments at the rate of six per cent per annum from the 31st day of December of the year in which the same became payable.

6 The equivalent in legal tender of the United States of America, of a pound sterling, during all of said period, was and still is the sum of $4.86½.

Wherefore, the Claimant demands judgment against the United States of America.

First. For the sum of $109,462.50, with interest, at the rate of six per cent per annum, on $21,892.50 from December 31, 1905, on $21,892.50 from December 31, 1906, on $21,892.50 from December 31, 1907, on $21,892.50 from December 31, 1908, and on $21,892.50 from December 31, 1909.

Second. For such other and further relief in the premises as to the Court shall seem just, together with costs.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for Claimant, 37 *Wall Street*,
New York City.

LOUIS MARSHALL,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Louis Marshall, being duly sworn, deposes and says:

I am an attorney and counselor at law and a member of the law firm of Guggenheimer, Untermyer & Marshall of No. 37 Wall Street, in the Borough of Manhattan, City of New York, and as such attorney I have been and am duly authorized by The Eastern
7 Extension, Australasia and China Telegraph Company, Limited, to prosecute the claim set forth in the foregoing petition, and to verify the same. I have read the said petition and know the contents thereof, and the same is true.

LOUIS MARSHALL.

Subscribed and Sworn to before me this first day of August, Nineteen hundred and ten.

[NOTARIAL SEAL.] EDWARD M. NEARY,
Notary Public, Kings County.

Certificate filed in New York County.

7*a* SCHEDULE A.

The Spanish Government to the Eastern Extension, Australasia and China Telegraph Company, Limited. Concession for the Establishment and Working of a Submarine Telegraph Cable Between Luzon and Hong-Kong.

Dated 22nd February, 1879.

7*b* Luis Gonzalez Martinez, Notary, Montera, 31, Madrid.

No. 252.

In Madrid, the 6th of March, of the year 1879, I, Don Luis Gonzalez Martinez, Notary of this illustrious College, of the Colonial Ministry, &c., resident of this capital, proceeded to the said Ministry of the Colonies, there being present in the office of Ministry H. E. Señor Don José Elduayen y Gorriti, Marquis del Pazo de la Merced, Minister of the Colonies, Deputy to Congress, married, proprietor, of this city, who appears in this instrument in representation of the State. He does not produce his certificate of identity, being exonerated on account of the office he holds, in accordance with the provisions of the Royal Warrant of the 23rd March, 1875, and Mr. William Warden Morice, 47 years of age, bachelor, proprietor, a resident of London, at present sojourning in this capital, at the Hotel de Paris, No. 54, who presents and exhibits his passport, delivered in London by the Secretary of State, on the 27th of November last, bearing the number 6,653, registered at the Spanish Consulate, in

the said City of London, on the following day under the number 491.

This gentlemen appears in the capacity of attorney for the Telegraph Construction and Maintenance Company, and for the Submarine Telegraph Cable Company, called the "Eastern Extension," the representation of which Companies he establishes by the production of a Power of Attorney from them, dated in London, on the 3rd of February last, in the presence of the notary, William Webb Venn, the which, presented at the office of interpretation of languages for the purpose of being translated, legalised at the Ministry of State, and furnished with the corresponding stamp, has been brought to me in order that I may testify to it, and join it to this instrument, and insert it in the copies thereof, and the Power of Attorney literally says the following:

7c Know all men by these presents that the Telegraph Construction and Maintenance Company, Limited, whose officers are at 38, Old Broad Street, in the City of London, and the Eastern Extension, Australasia and China Telegraph Company, Limited, whose offices are at No. 66 Old Broad Street, in the said City, do hereby constitute and appoint William Warden Morice, Esquire, who is about to proceed to Madrid, the agent and attorney of the said Companies, and each of them, for the special purpose of negotiating with the Government of His Majesty the King of Spain the terms of a concession to the said Companies for establishing a Submarine Telegraph Cable between Hong Kong and the Island of Luzon, with power for the said attorney and agent to accept such concession on behalf of the said Company, and to lodge the caution money in respect thereof, and to do all other necessary acts in relation thereto. And whatsoever the said attorney and agent shall lawfully do in accordance with these presents the Companies agree to ratify and confirm.

In Witness whereof the said Companies have hereunto caused their respective corporate seals to be affixed the 3rd day of February, 1879.

The common seal of the Eastern Extension Australasia and China Telegraph Company Limited was hereunto affixed in the presence of

JAMES ANDERSON, *Director.*
F. E. HESSE, *Secretary.* [L. S.]

The common seal of the Telegraph Construction and Maintenance Company Limited was hereunto affixed in the presence of

GEO. HENRY RICHARDS, *Director.*
W. SHUTER, *Secretary.* [L. S.]

I, William Webb Venn, junior, of the City of London, Notary Public by Royal authority, duly admitted and sworn, undersigned, do hereby certify and attest unto all whom it may concern, that I attended at the offices of the Telegraph Construction and Maintenance Company Limited, and also at the offices of the Eastern Extension, Australasia and China Telegraph Company, Limited, and did

7d see the common seals of the respective Companies duly affixed at foot of the foregoing Power of Attorney, in the presence of

Sir James Anderson, Director, and Frederick Edward Hesse, Secretary to the Eastern Extension, Australasia and China Telegraph Company Limited, and Vice-Admiral Sir George Henry Richards, C. B., Director, and William Shuter, Secretary, of the Telegraph Construction and Maintenance Company Limited, who have all subscribed their signatures opposite to the respective seals of the said Companies; so that full faith and credit may and ought to be given to the said common seals and signatures in Courts of Judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed my said official seal to serve and avail where needful. London, this 4th day of February, in the year 1879.

Quod Attesto,

[L. S.] W. W. VENN, JUN.

Seen for the legalisation of the preceding signature and seal, which are those used by Mr. William W. Venn, Junior, Notary Public of this City, whom I know, and to whom I give entire credence.

London, 4th February, 1879.

For the Consul General.

The Vice Consul.

[L. S.] (Signed) T. AVENDAÑO.

No. 45.
Fees 8/9.
Art. 133.
Reg'd fol. 10. No. 128 of 1879.

No. 233.

Seen in this Ministry of State to legalise the signature of D. Teodonino Avendaño, Spanish Consul in London.

Madrid, 4th March, 1879.

The Sub-Secretary.

[L. S.] (Signed) RAFAEL FERRAZ.

I, the Chief Clerk of the Translation Department of the Ministry of State, certify that the foregoing is a true and literal translation of a Power of Attorney, drawn up in the English language, which has been brought to me for translation.

Madrid, 1st March, 1879.

(Signed) MANUEL DE LABRA.

7c This corresponds with the original, which I return, duly marked, to the holder, and at his request I deliver these presents on three sheets of the stamp No. 10, bearing the numbers 437,717 to 18, in Madrid, on the 5th March, 1879.

(Signed) LUIS GONZALEZ MARTINEZ.

Corresponds with the original to which I refer, Mr. Warden Morice affirming that the said power has not been revoked nor limited.

I know and recognise the parties to this contract by their names and other circumstances, the passport of the second party being also put in, to which I refer. The parties declare themselves to be in full exercise of their rights, nothing to the contrary being known to me; wherefore, with the full legal capacity for the execution of the present deed of contract for the establishment and working of a Submarine Telegraphic Cable between the Coast of China (Hong Kong), and the Island of Luzon, and in the manner and form most binding in law, in the positions in which they stand, they adduce the following facts:—

First. That by the Royal Decree of the 14th December, 1878, published in the Madrid Gazette of the following day, having heard the opinion of the Colonial Department of the Council of State, and in accordance with the decision of the Council of Ministers, H. E. the Minister for the Colonies is authorized to make a contract, open to public competition, for the establishment and working of a Submarine Telegraphic Cable between the Coast of China (Hong Kong) and the Island of Luzon, Cape Bojeador or Cape Bolinao, in conformity with the schedule of conditions approved on the same date, fixing the period of 60 days, counted from the date of the publication of the said Decree, for the presentation of proposals in sealed envelopes, up to the hour of 12 o'clock of the night of the day on which the said period expires, the Notary who attends being required to give testimony of the tenders handed in up to the said hour, each tender being accompanied by a receipt from the Receptorate General of Deposits, establishing the fact of a deposit having been made of the sum of $10,000, or the equivalent thereof in public securities, at the published quotations, the period for the hold-
7f ing of the public competition being fixed for the day following that of the expiration of the term prescribed for receiving the tenders, the heads of departments of the said Ministry being assembled, with the assistance of the Notary, in the offices of the Ministry, to open and read the tenders, drawing up and signing the necessary document to which will be attached the aforesaid tender, which will be submitted by H. E. the Minister for the Colonies, with his opinion, to the Council of Ministers for their resolution, and for the election of the proposal which may be considered to be most beneficial to the State, chiefly with respect to the subvention, either as regards the diminution of the monthly sums payable to the Concessionary, or the reduction of the number of years stipulated in the 11th Article of the schedule of conditions; which resolution shall be published in the Gazette, together with the minutes of the proceedings, it being obligatory on the person to whom the contract is assigned to increase the amount of his deposit, within the period of the following 15 days, to the extent of double the original sum, as a guarantee to respond for the inauguration of the Cable line within the time specified, and to enter into the corresponding contract, and to lose the first deposit if he does not comply with these conditions in

the time specified, all which is stated with more detail in the aforesaid Royal Decree.

Second. That at 11 o'clock at night on the 13th February last, the undersigned Notary proceeded to the Colonial Office for the purpose of drawing up a minute of the result of the presentation of tenders for the aforesaid competition, there being presented, up to the hour of 12 o'clock at night, three closed and sealed papers, which were numbered in the order of their delivery, obtaining the first number that of Don Juan S. Perez, the second that of Mr. William Warden Morice, and the third that of Don José Zapatero, and after having been marked, they were deposited in a box, which was closed and left in the Subsecretariat.

Third. That on the following day the present Notary proceeded to the Colonial Office where were assembled the heads of depart-
8 ments of the Ministry, and the Minister having arrived before 12 o'clock of the day, the Committee for conducting the competition aforesaid remained constituted. The clock having struck 12, the proceedings commenced with the presentation of the tenders and the reading of the minute drawn up to certify their delivery. All the details of the proceedings being given in the account which was drawn up, and which are not repeated here as they are copied verbatim in another place.

Fourth. This being the state of the case, Mr. Warden Morice, by letter addressed to H. E. the Minister for the Colonies, under date 21st February last, in addition to that which is stated in his tender bound his constituents to concede to the Government gratuitous and preferential transmission by Cable of the official despatches during the forty years of the duration of the exclusive privilege.

Fifth. That by Royal Warrant of the 22nd February last, published in the Gazette of the 1st instant, H. M. the King (whom God preserve) on the recommendation of the Minister for the Colonies, and with the concurrence of the Council of Ministers, has been pleased to command that the concession of the establishment and working of the Submarine Cable between the Island of Luzon and Hong Kong be granted to Mr. William Warden Morice, representing the Telegraph Construction and Maintenance and the Eastern Extension Companies, under the conditions contained in the schedule approved on the 14th December last, and subject to the modifications which he has offered on behalf of the said Companies, at the time of the competition for the contract, and subsequently.

Sixth. That, consequent on the aforesaid adjudication, the Companies contracting have deposited $20,000 as a guarantee to respond for the inauguration of the line and other details.

The Royal Decree of the 14th December last, the schedule of conditions, Royal Warrant for the adjudication of the contract, minute of the result of the competition (published in the
9 Government Gazette of the 1st instant), letter addressed by Mr. Warden Morice to H. E. the Minister for the Colonies, and the receipt of the deposit hereinbefore mentioned, copied verbatim, state the following:

Royal Decree of the 14th December, 1878.

In view of the reasons given by the Minister for the Colonies, and of the opinion of the Colonial Department of the Council of State, and with the concurrence of the Council of Ministers, I decree the following:

Article 1. The Minister for the Colonies is authorized to submit to public competition, on the basis of the schedule of conditions approved on this date, a contract for the establishment and working of a Submarine Telegraph Cable between the West Coast of the Island of Luzon (Cape Bojeador or Cape Bolinao) and Hong Kong, to place Manilla in communication with the universal telegraph system.

Article 2. The persons who desire to tender for this work will send in their proposals to the Ministry of the Colonies, in sealed envelopes, within a period of 60 days, reckoned from that of the publication of this Decree in the Madrid Gazette, and before 12 o'clock at night of the day on which this term expires.

Article 3. Every proposal to be admitted to the competition must be accompanied by a document showing that a deposit of $10,000 (or the equivalent thereof in the bonds of the State, at the quotation of the previous day, or at the rate established by law) has been previously lodged at the General Deposit Bank.

Article 4. The Sub-secretary of the Ministry shall cause to be noted on the cover of each proposal the day of its receipt and the number corresponding, both of which annotations shall be recorded in a register opened for the purpose. Every person presenting a tender shall be furnished with a corresponding receipt.

After 12 o'clock at night of the last day of the term hereinbefore mentioned no tender shall be received. The Notary who attends to witness these proceedings shall give a certificate of the tenders presented up to the hour specified in the 2d Article of this Decree.

Article 5. If any person tendering should withdraw his tender after presenting it, he will incur the penalty of the forfeiture of the deposit specified in the 3d Article of this Decree.

Article 6. In the course of the competition which will take place at 12 o'clock of the day following the expiration of the period specified for receiving tenders, and which will be held publicly, the Minister for the Colonies, together with the heads of departments of the same Ministry, in presence of the Notary appointed to witness the proceedings, will order the sealed covers to be opened and the contents to be read, and a minute to be drawn up, (which must be signed by all the persons present), reciting substantially the proposals made, and certifying that they were accompanied by the coresponding deposit receipts. Any proposals sent in without the deposit receipts will be regarded as not presented, and be immediately handed back to the authors.

The persons tendering may, in the course of the proceedings, with the President's sanction, give any explanations necessary for

the better comprehension of their proposals, which explanations shall be inserted in the minute.

Article 7. The minute having been duly drawn up and signed, the tenders shall be attached to it, and the whole shall be submitted by the Minister for the Colonies, with his opinion, to the Council of Ministers, who will select the proposal most advantageous for the State, chiefly in relation with the subvention, either diminishing the monthly amounts to be received by the Concessionary, or making a reduction in the number of years during which it has to be paid, in conformity with the provisions of the 11th Article of the schedule of conditions.

The decision of the Council of Ministers will be published in the Gazette, together with the minute of the proceedings of the competition.

Article 8. After the selection shall have been made by the Council of Ministers, all the receipts for the deposits made in accordance with Article 3 shall be returned to the persons whose tenders have been rejected.

The receipt corresponding to the proposal accepted shall be retained, in order that within a period of 15 days the tenderer may increase the deposit to double the original sum, as a guarantee that the Cable line will be inaugurated within the stipulated time, and he shall also execute a deed of contract, forfeiting the first deposit if he does not comply with these conditions within the time mentioned.

Article 9. The Minister for the Colonies is charged to carry out the provisions of this Decree.

Given at the Palace on the 14th December, 1878.

(Signed) ALFONSO.

(Countersigned) JOSE ELDUAYEN,
Minister of Colonies.

11 *Schedule of Conditions for the Laying and Working of a Submarine Telegraph Cable Between the Western Coast of the Island of Luzon and Hong Kong.*

Article 1. The Contractor undertakes to lay and work for his account a Submarine Telegraph Cable between the Western Coast of Luzon (Cape Bojeador or Cape Bolinao) and Hong Kong, which shall connect Manilla with Hong Kong and with the general telegraph system. The distance between Cape Bojeador and Hong Kong, taken at sea level, is about 430 miles, and from Cape Bolinao to Hong Kong 475 miles.

Article 2. The Cable shall be made fast at the point of the abovementioned coast which the Contractor may consider most suitable for the line and for the safety of the Cables. The Contractor shall submit for the approval of Government, the profiles, plans and surveys of the intended route, from the starting point to the landing place, within a year from the date of the final concession.

Article 3. The Cable shall consist of one conductor, formed of a strand of seven copper wires, weighing at least 107 lbs. English

per nautical mile, and its electrical resistance after the Cable is laid (and allowing for the correction of the temperature to reduce it to 24 degrees centigrade) shall not exceed 13 ohms per nautical mile. This conductor shall be covered with a coating of Chatterton's composition, followed by three coatings of gutta percha alternated with coatings of the above-named composition; its insulating resistance after the Cables are laid, and allowing for the correction of the temperature to reduce it to 24 degrees centigrade, shall not be less than 200 megohms per nautical mile. The core shall be covered with servings of hemp (steeped in a preservative composition) necessary to receive the sheathings corresponding to the different types of Cable to be employed.

The sheathing of the deep sea Cable shall consist of ten or twelve iron wires, six millimeters in diameter, laid spirally, and protected by two servings of hemp and coated with Clarke's composition. The sheathing of the shore end Cable may be either double or single at the option of the Contractor. In the event of its being double, it shall consist of fourteen iron wires, eight millimeters in diameter, laid spirally over the sheathing of the deep sea Cable. In the event of its being single, it shall consist of ten iron wires, ten millimeters in diameter, laid spirally. In both cases the sheathings shall
12 be protected by two servings of hemp coated with Clarke's composition, as in the case of the deep sea Cable.

Article 4. In the neighborhood of the coasts the Cable shall be laid in the line of the currents by using two miles of shore end Cable, and then two miles of "intermediate" before joining on to the "deep sea" Type.

Article 5. The Contractor can adopt such system of apparatus as he may deem suitable for working the Cable, modifying or changing it as he thinks best, but he shall always keep at the principle station the following testing instruments: one Thomson's reflecting galvanometer with all its adjuncts, one Wheatstone's bridge with resistance coils up to 10,000 ohms, one condenser of a third of a farad, one Thomson's receiving syphon of the newest type, with the local battery, and the tools necessary for splicing Cables.

Article 6. The receiving and transmitting station for the working of the Cable shall be situated in that office of the State which the Government shall deem most suitable for the purpose, the Contractor paying a fair proportion of rent corresponding to the increase of the premises required for the establishment of the new station, and the branch telegraph line which is to connect the end of the Cable with the nearest station of the State shall be constructed at his expense.

Article 7. The materials required for the construction on Spanish territory of the aerial line, which is to connect the Cable with the station above-mentioned, as well as the apparatus and other instruments, shall be considered as items of a public work, and as such shall enjoy the immunities conceded by the existing laws.

Article 8. The telegraphists and other persons employed in the working of the Cable shall be chosen by the Contractor, but subject in the exercise of their duties to the provisions contained in the telegraph regulations of the islands. In addition to this, the Govern-

ment reserves to itself the right of organising, in connection with the Cable, such a system of supervision as may be most in accordance with the present administrative regulations. Consequently telegrams received and presented for transmission, shall be handed over to the officials of the State, who will act as intermediaries between the public and the Contractor's agents.

Article 9. The Government may establish, wherever it deems it expedient, the aerial and submarine telegraph lines in the
13 Philippine Islands which are necessary for the Government and public service of the said provinces.

Article 10. Telegrams passing through the Cable shall be delivered at the station mentioned in the 6th Article hereof, for the necessary purposes, so long as the requirements of the service do not call for a change of the delivery station.

Article 11. The Government will pay to the Concessionary of the Luzon-Hong Kong Cable a monthly subsidy of $4,000, for a period of 10 years, reckoned from the date of transmission over the submarine Cable of the first despatch, so long as the Cables are in good working order, for which effect the Concessionary will be required to produce a certificate from the Inspector to be named by Government. The above-mentioned subsidy shall be paid monthly by the Manila Treasury, one-third by the Treasury, and the remaining two-thirds by the local funds, as provided in similar cases. If, during the working of the Cable, it should cease to transmit messages, the Government will not pay the subsidy so long as the interruption lasts; but if it be repaired within the space of one year, the period of interruption shall not be taken into account in the calculation of the subsidy in question.

Article 12. The Concessionary shall enjoy an exclusive privilege for 40 years, during which period it shall not be lawful for the Government to grant the right of laying any other Cable between the points mentioned in this Concession. The Government reserves to itself the right of suspending the transmission of messages over the Cable, if they should appear dangerous to the security of the State, in conformity with the stipulation of the last International Telegraph Convention, the regulations of which shall apply to this telegraph route so long as they do not clash with the clauses of this concession.

Article 13. The Cable must be laid and working in good electrical condition within the term of two years, reckoned from the date of the definite concession. If it should not be so laid, or, if through causes under the control of the Contractor, it should prove useless for the service within the term above-mentioned, the concession shall be null and void, and the deposit shall be forfeited. On proof being given that the suspension of working has been brought about by the breaking of the Cable, or by unforeseen accidents in the laying, the above-mentioned term shall be extended by one year. In the event of the conductors becoming useless, even, from causes beyond
14 the control of the Contractor, during the period of the concession, he shall be bound to replace them so that communication may be restored within a period not exceeding one year. In

default of this being done within that time, the concession shall be considered null and void.

Article 14. The Contractor shall admit on board the ship carrying the Cable the Commissioner or Commissioners of the Government, to superintend the operations of laying, landing and reception of the Cable.

Article 15. Whenever the working of the line may be interrupted, totally or partially, for more than one month, in consequence of accidents or disputes between the Company and its servants, or from any cause attributable to the negligence, bad management, or want of organization of the undertaking, the Government shall have power to take charge of the Cable and to receive the sums accruing from the working, which shall be handed over to the Company at the proper time, after deducting the expenses of the official administration, and those of maintenance, repairs, and of any modification or change of apparatus which may have been necessary. This concession shall be considered lapsed if the period of interruption of the working shall exceed one year, reckoned from the official notification given to the Company; the apparatus and other serviceable materials becoming the property of the Government, as some compensation for the prejudice caused to the country by the total interruption of the service.

Article 16. The official correspondence of the Government shall enjoy the privilege of priority and free transmission over the Cable, in conformity with the telegraphic service regulations now in force in the Philippine Islands, during the term of the subsidy; at the expiration of which it shall enjoy priority and be paid for at one-half the established tariff rates.

Article 17. The Contractor may fix the tariff according to which telegrams sent over the Cable are to be charged, but the highest rates shall not exceed those of other Submarine Telegraph Companies, whose Cables are in analogous conditions. In any case, telegraphic correspondence shall pay rates equal to those now charged by the Spanish Administration, in conformity with the tariffs in force on telegrams forwarded, received, and in transit. Should any modifications be introduced in the said tariffs, the Contractor will have to make a similar alteration with respect to the amounts to be levied on account of the Spanish Administration.

15 Article 18. The accounts shall be kept by both parties as may be mutually agreed, conforming, as far as possible, to the existing international regulations. Consequently, the St. Petersburg Convention or any other convention made in modification thereof, provided that Spain be a party thereto, and that it be not in opposition to the clauses of this concession, shall be considered to be the basis of this arrangement. The said conventions shall also regulate the international service.

Article 19. The Contractor shall appoint duly authorized representatives in Madrid and Manilla, to intervene in all matters or disputes which may arise between the Spanish Administration and the said Contractor. All such questions must be decided in the manner prescribed by the existing regulations with respect to the interpretation and effects of Colonial public contracts.

Article 20. There shall be laid down, with the Company's concurrence, in a special regulation, everything relating to the international telegraphic tariffs which has to bear upon the transmission by the Company of private telegrams and other details of the working of the Cable, and the same regulation shall make provision for the guarantee which the Company will be required to give for the recovery of the proportion of the price of the telegraphic despatches which belongs to the Government lines.

Article 21. On the adjudication of the contract a corresponding deed will be executed, the cost of which, of the two copies thereof for the Colonial Office, shall be defrayed by the Concessionary.

Article 22. Neglect on the part of the Concessionary to comply with any one of the clauses of this concession shall be deemed sufficient to nullify it.

Article 23. Proposals must be drawn up in the form following:—The undersigned undertakes to lay within two years, and to work, a Submarine Telegraph Cable from Manilla to Hong-Kong, in connection with the general telegraph system, upon the conditions approved on (date), and published in the Gazette of Madrid on the (date), in consideration of a monthly subsidy of (amount of subsidy), to be paid by the Government for the term of (number of years).

Madrid, 14th December, 1878.

Approved by His Majesty.

ELDUAYEN.

16 *Mr. Warden Morice's Letter.*

MADRID, 21*st February*, 1879.

H. E. Minister the Colonies, Madrid.

SIR: On the 14th instant I had the honour to present to your Excellency a proposal of the Telegraph Construction and Maintenance Company, and of the Company which owns and works the great Submarine Telegraph Lines of the Indies, China and Australia, relative to the laying and working of a telegraphic Cable between Hong Kong and the Island of Luzon.

I was anxious to include in my proposal a very important concession in favour of the State, viz., that of the absolute freedom from charge of all official messages during the forty years of the concession, and I had already written to London in that sense, but, owing to the difficulty of getting together the Boards of the two Companies, and submitting my indication for their approval, it was only this morning that I received a telegram sanctioning my suggestion.

Although the last article of the Royal Decree of the 14th December stipulates that the Council of Ministers will select the proposal which they consider most advantageous to the State, having regard chiefly to the question of the subvention, your Excellency will readily perceive that the concession which I have now the honour to offer, surpasses by a great deal an insignificant diminution of the monthly sum payable to the Concessionary, or a slight reduction of

the number of years mentioned in the 11th Article of the schedule of conditions.

My present offer being therefore highly advantageous to the State, and it being in evidence that I have already undertaken, in the name of the Companies which I represent, to establish the telegraphic communication in eighteen months, and considering, moreover, the high position of the Companies, and the undoubted guarantee which they offer in connection with the laying and working of the projected Cable, I trust that your Excellency, consulting the best interests of the valuable Colony of the Philippines, will sanction the amendments of my tender in the sense indicated; the 16th Article of the schedule of conditions being altered therefore to the following form:—

Article 16. The official correspondence of the Government will be transmitted free of charge through the Cable, and with right of priority, during the 40 years of the concession.

(Signed) W. WARDEN MORICE.

17 *Royal Warrant of Adjudication.*

The Director General of Grace and Justice, Administration, and Public Works:

With reference to the public competition held on the 14th inst., for the adjudication of a contract for laying and working a Submarine Telegraphic Cable between the Island of Luzon and Hong Kong, pursuant to the authority granted by Royal Decree, dated the 14th of December of last year, and in accordance with the schedule of conditions approved on the same day:

Considering that at the said competition the conditions and formalities prescribed in the said Royal Decree have been duly observed:

Having seen the official report on the said public competition, which is transcribed in continuation hereof:

Having seen the three tenders made, the first by Don Juan S. Perez, in which he offers to accept a reduction of the subsidy for a term of 12 months; the second by Mr. William Warden Morice, as representative of the Telegraph Construction and Maintenance Company, and the Eastern Extension, Australia and China Company, in which, although no reduction is made in the subsidy, he proposes to construct and lay the Cable within a term of 18 months, handing in a written statement and a plan, showing that the said Companies have constructed and laid 50,000 miles of Cable, including the Cables to which the projected line will be joined, and the third by Don José Zapatero, proposing a reduction of the subsidy for the term of 14 months, which, however, is accompanied by a note which must be considered as forming part of the tender, and in which the acceptance of the conditions is made dependent upon the greater or lesser depth of the seas in which the Cable has to be laid:

Having seen the official letter of Mr. William Warden Morice, in which he states that in the event of the concession being given to

the Companies represented by him, they will undertake to allow the transmission of the official correspondence of the Government over the Cable, gratuitously, and with right of priority, for the term of the 40 years of the duration of the privilege mentioned in the 12th Article of the schedule of conditions:

Considering that the explanatory note presented by Don José Zapatero nullifies his tender, since it leaves in suspense the observance of the general conditions, the tenderer not engaging to be bound by the same:

18 Considering that although the reduction proposed by Don Juan S. Perez would effect a saving of $48,000, yet, on the other hand, it must be borne in mind that the Government's right to the free transmission of its official correspondence is limited to the term of the subsidy, after which half rates will be charged, reducing the said term to 9 years, on the 10th year half the tariff charges would be levied, and consequently it is necessary to deduct from the above mentioned sum of $48,000, the total amount to be paid on that account:

Considering that in the tender signed by William Warden Morice on behalf of the above-mentioned Companies, although he makes no reduction in the subsidy, yet he offers to complete the construction and to have the Cable laid in 6 months less than the time stipulated in the schedule of conditions, a circumstance worthy of the consideration of His Majesty's Government, which desires to see the Philippine Archipelago connected as soon as possible with the general telegraph system:

Considering that the offer of the Companies represented by Mr. Morice to convey the official correspondence of the Government free of charge over the Cable, for the period of the 40 years of the duration of the privilege, is more advantageous to the State than the surrender of one year's subsidy offered by Don Juan S. Perez:

Considering that the proposal of the said Companies, besides being more advantageous than that of Don Juan S. Perez, from an economical point of view, is so also in view of the guarantees afforded by their well known experience in constructing and laying Submarine Telegraph Cables:

And, lastly, considering that the circumstance of the said Companies being possessors of the Submarine Telegraph lines to which the projected Cable is to be joined, will facilitate the rapid transmission of the correspondence and the surveillance of the new Cable, and at the same time afford the advantage of uniformity of tariffs.

For these reasons—

His Majesty the King (whom God preserve) at the instance of the Minister for the Colonies, and with the concurrence of the Council of Ministers, has been pleased to order that the concession for the establishment and working of the Submarine Cable between the Island of Luzon and Hong Kong, be granted to Mr. William Warden Morice as representative of the Telegraph Construction and Maintenance Company and the Eastern Extension, Australasia, and China Company, under the conditions contained in the schedule

19 approved on the 14th of December last, and subject to the modifications which he has offered on behalf of the said Com-

panies, at the time of the competition for the contract, and subsequently.

All which, by Royal Order, I communicate to you for the necessary purposes, and in order that you may direct the return of the vouchers for the deposits made in conformity with the 3d Article of the Royal Decree, dated 14th December last, to the persons whose tenders have not been accepted, retaining that which corresponds to the tender accepted, the author of which will be required to double the amount of said deposit, as a security that the Cable will be in working order within the time prescribed, and to execute the requisite deed of contract in pursuance of the provisions of the 8th Article of said Royal Decree.

God preserve you many years.

Madrid, 22d February, 1879.

ELDUAYEN.

Minute of the Result of the Competition.

MADRID, *14th February*, 1879.

No. 168.

I, Don Luiz Gonzalez Martinez, Notary of the Illustrious College of Madrid, and of the Colonial Office, &c., in compliance with instructions, attended at 11 o'clock of the morning of this day, at the said Ministry of the Colonies, where had met the Excellent and Illustrious Don Francisco Rubio y Pablos, Under-Secretary of the Colonial Office, the Illustrious Don Angel Maria Dacarrete y Hernandez, Director General of Finance, the Illustrious Don Enrique Cisneros, Director General of Grace and Justice, Administration and Public Works, and Don Francisco de Asis Luceno Bulgarini, Chief of the Telegraph Department.

Before 12 o'clock noon His Excellency Don José Elduaven y Gorriti, Marquis del Pazo de la Merced, Minister of the Colonies, arrived, and the Board was constituted for the purpose of adjudicating the contract open to public competition for the establishment and working of a Submarine Telegraph Cable between the Coast of China (Hong Kong) and the Island of Luzon (Cape Bogeador or Bolinao), in conformity with the schedule of conditions approved by his majesty on the 14th December, 1878, and published in the Gazette of Madrid of the following day. His Excellency, the said Minister, presided.

At 12 o'clock the Under-Secretary produced the only three tenders sent in, closed and sealed, and which had been deposited up to 12 o'clock of the previous night. The same were numbered according to the order in which they were presented, the names of the persons tendering, and the time of the presentation of their tenders, having been noted in a register prepared for the purpose.

In pursuance of the stipulation of the 4th Article of the Royal

Decree of the 14th of December last, the undersigned Notary made a minute, at 12 o'clock last night, of the delivery of the three mentioned sealed packets with the names and the time of delivery.

The public were invited to ascertain that the packets were in the same condition as when presented, but no observation was made.

Subsequently the President ordered me to read the official notice of the competition, the Royal Decree sanctioning the same, and the schedule of conditions; and this having been done, his Excellency intimated that any one desirous of giving any explanation would have an opportunity of doing so before the close of the proceedings.

And I, the undersigned Notary, did open the said packets, which were accompanied respectively by vouchers from the General Deposit Bank, showing that the requisite caution money had been properly deposited in advance, and the following is the tenour of each tender, in accordance with the order in which they were presented.

Tenders.

No. 1.

The undersigned undertakes to lay within a term of two years, and to work a Submarine Telegraph Cable, from Manila to Hong Kong, which shall be connected with the general telegraphic system, in accordance with the conditions approved on the 14th of December, 1878, and published in the Madrid Gazette of the 15th day of said month and year, in consideration of a monthly subsidy of $4,000, which he shall receive from the Government for a term of nine years.

The undersigned accepts all the conditions contained in the schedule above referred to, and undertakes to introduce, with the concurrence of His Majesty's Government, all such improvements in the construction and laying of the Cable as may be requisite in the interest of the public service, and all others which may hereafter come to light as the result of the latest advancement and discoveries of science.

JUAN S. PEREZ.

21 No. 2.

MADRID, 13*th February*, 1879.

The undersigned undertakes to lay within a term of 18 months, and to work a submarine Telegraph Cable from Manila to Hong Kong, which shall be connected with the general telegraphic system in accordance with the conditions approved on the 14th of December, 1878, and published in the Madrid Gazette of the 15th day of said month and year, in consideration of a monthly subsidy of $4,000, which he shall receive from the Government for a term of 10 years.

WILLIAM WARDEN MORICE.

Attorney of the Construction and Maintenance Submarine Cables Company and of the Submarine Telegraph Company, Called the Eastern Extension, Both of Old Broad Street, London.

No. 3.

The undersigned undertakes to lay within a term of two years, and to work a Submarine Telegraph and Cable from Manila to Hong Kong, which shall be connected with the general telegraph system, in accordance with the conditions approved on the 14th of December, 1878, and published in the Madrid Gazette of the 15th day of said month and year, in consideration of a monthly subsidy of $4,000, which he shall receive from the Government for a term of eight years and ten months.

Madrid, 13th of February, 1879.

JOSE ZAPATERO.

Don José Zapatero requested the President to allow it to appear in the minute, as an explanatory addition to his tender, that in the case alluded to in the 2d Article of the schedule of conditions, if a depth of water should be found so great as not to allow of the Cable being laid in accordance with the conditions laid down in the schedule, the Concessionary shall be at liberty to modify the condition in conformity with the depth to which the Cable must be submerged, but so as not to interfere with the working of the Cable, submitting beforehand a plan for the approval of the Ministry, it being, however, understood, that at the places where no such obstacle to the laying of the Cable is met with, the general conditions of the schedule shall remain in force.

Mr. William Warden Morice, jointly with his tender, handed in a written statement on stamped paper of the eleventh class, which is annexed to this minute, and will be filed in the Archives, the tenour whereof is as follows:

22 To His Excellency the Minister of Colonies, Madrid.

SIR: I, William Warden Morice, respectfully beg to state that I have come to this Court as representative of the Telegraph Construction and Maintenance Company, and of the Company which at present owns and works the Submarine Telegraph Cable, connecting China and the Indies with Europe, whose station is at Hong Kong, to submit to His Majesty's Government a proposal for laying a Submarine Cable between Hong Kong and the Island of Luzon, capital of the wealthy and flourishing dependency of the Philippine Islands.

The Construction Company, as your Excellency may see in the accompanying map, has already manufactured and laid about 20,000 leagues of telegraph Cable, and the Eastern Extension Company has been working, since the year 1871, the telegraph system between China and England. These two powerful and well-known Companies, joining together in undertaking the contract about to be adjudicated, offer to His Majesty's Government a double guarantee—that of the Construction Company, which in the immense works executed and undertaken since 1854 has never failed, even to the extent of an hour, to fulfil its engagements, and that of the

Company which has under its direction, not only the line to the Indies and China, but also the extension of the telegraph system to the Colonies of Australasia and New Zealand, and over whose Cables all the messages transmitted from the Philippine Islands must pass. I venture to say that no other Company or person coming before your Excellency, with the pretension of carrying out the important undertaking in question, can offer the same guarantees with regard to the construction and laying of the Cable, and the working and management thereof during the long time fixed for the duration of the privilege. I have been told that already, on two former occasions this concession has been granted to persons who have been unable to comply wth the responsibilities which they undertook, and consequently, up to this day, the valuable colony of the Philippines remains without direct communication with the mother country. It is true that the persons who have so failed in their engagements have had to suffer the consequences of their incautiousness, forfeiting to the State the sums deposited as guarantee for the fulfilment of the contracts, but your Excellency, better than any one, can judge how insignificant such a compensation has been, when compared with the inconvenience caused to the State, and the detriment
23 to public and private interests, by the want of the much desired telegraphic communication with the Oriental Colony of Spain. I must also remind your Excellency that the working of the Cable, when laid, offers many serious difficulties to a Company not possessing, as do ours, special steamers constantly employed in watching in those distant seas over the safety of the Cables, and in attending to their repair and maintenance; and I take the liberty of asking your Excellency what sacrifice of subsidy or deprivation of privilege imposed on the Contractors would compensate for a long interruption in the communication when once established? and what would not be the inconvenience to the public service and the mercantile community of a suspension in the working of the Cable for an indefinite period of time? Allow me to remind your Excellency that, in the year 1876, the Director of Telegraphs of Manila, having been commissioned to ascertain the terms on which telegraphic communication between Luzon and Hong Kong could be established, went to England and applied to the Companies which I have the honour to represent, and, after a long and careful study of the details, the said Companies fixed a yearly subsidy of £10,000, and if they will not now consent to make any reduction of this subsidy, it is because their long experience in works of this kind convinces them that the subsidy demanded is nothing more than an equitable compensation for the risk attending a difficult and costly operation, and merely sufficient to yield a moderate interest on the capital required for the construction and submersion of the Cable.

For these reasons I trust your Excellency, before the contract is assigned, will take into consideration, not only the question of the greater or lesser amount of subsidy which the State will have to pay to the Contractors, but also the very much more important points, such as the laying the Cable in the best possible manner and with

the least practicable delay, and the certainty of having the service conducted with the security and punctuality desirable.

I remain,

Your Excellency's obedient servant,

WILLIAM WARDEN MORICE.

All the foregoing are true copies of the originals, to which I refer, the same having been initialed by me; after which the President declared the proceedings closed. And for the necessary purposes I have drawn up this minute, which has been signed by their Excellencies and by the gentlemen tendering, the first of whom offered to produce his personal certificate of citizenship, the
24 second, Mr. Zapatero, produced his, which had been granted on the 10th of October, 1878, under No. 1,018, by the Mayor of the district of Buenavista, and Mr. Morice, as a foreigner, produced his passport, delivered in London by the Secretary of State on the 28th of November last, under No. 6,653, and registered at the Spanish Consulate in London on the following day, under No. 491, which said documents have been returned by me to the said gentlemen.

And I, the undersigned Notary, do hereby testify to the correctness of the foregoing, to the delivery to me of the deposit receipts by the Chief of the Telegraph Department, and to the production of a map by the said Mr. Morice.

José Elduayen—Francisco Rubio—Angel Maria Dacarrette—Enrique de Cisneros—Francisco de A. Luceño—Juan S. Perez—William Warden Morice—José Zapatero.

(Signed) LUIS GONZALEZ MARTINEZ.

The foregoing agrees to the letter with the original, to which I refer, the same remaining annexed to my protocol of public deeds under No. 168.

And for the purposes and use of the Ministry for the Colonies I deliver these presents contained on five sheets of paper of the eleventh stamp, Nos. 436, 674 and from 76 to 79 inclusive, at Madrid, on the day of the date hereof.

LUIS GONZALEZ MARTINEZ.

There is a seal on which is written Luis Gonzalez Martinez, Notary, Madrid.

Form of Receipt.

Volume 127, No. 7.

General Deposit Bank, Central Office, Deposit Paper—Obligatory.

Mr. William Warden Morice, Attorney for the Telegraph Construction and Maintenance and the Eastern Extension, Australasia and China Companies, in guarantee of the inauguration of a Telegraphic Submarine Cable between Hong Kong and the Island of

Luzon, which concession has been granted to him by Royal Warrant of the 22nd February last, and at the disposal of the Directorate General of Peace and Justice, Administration and Public Works of the Ministry of the Colonies, has delivered, in deposit, two hundred bonds of the Bank and Treasury (external) representing a
25 nominal value of 100,000 pesetas, and which will be refunded with the corresponding formalities.

This receipt, which is numbered, must be registered in the Accountant's Department, without which registration it will have no force or value.

Madrid, 6th March, 1879. 100,000 pesetas.

The Treasurer.

(Signed) FRANCISCO PERALTA.

Noted.

The Accountant.

(Signed) DAMIAN M RAZON.

Receipt Number, 130,279.

Noted in the Treasury.

(Signed) ROMERO.

Register Number, 31,041.

Noted in Accountant's Department.

(Signed) PALMA.

At back—Class of Document 200, Bank and Treasury, Exterior Series, Nos. 119,601/700, 208,675/774. Date, 1st July, 1876. Coupons attached and their number, 38, amounts to, in pesetas, 100,000.

All the foregoing correspond verbatim with the originals which I return, inclusive of the letter addressed to the Minister of the Colonies, and to which I refer.

Therefore, with the object of giving all due formality to the corresponding deed of contract, the parties executing it agree to and subscribe the following conditions:—

First. Mr William Warden Morice, undertakes for the afore-mentioned Telegraph Construction and Maintenance, and Eastern Extension, Australasia and China Companies, the laying and working of the aforesaid Submarine Telegraphic Cable between the Coast of China (Hong Kong) and the Island of Luzon (Cape Bogeador or Cape Bolinao), and binds the said Companies to the carrying out of this work, without any excuse or pretext, in conformity with all that which appears in the schedule of conditions, and in the letter copied in this instrument (which documents are taken to be here repeated), and with the modifications in favour of the State which the said William Warden Morice, on behalf of the said Companies, has offered: the said Companies being amenable, by all the force of the
26 law, for the exact observance and fulfilment of the obligations *in-* incurred.

Second. As security for the exact observance of the aforesaid obligation Mr. William Warden Morice, as Attorney for the Companies aforesaid, places at the disposal of the Colonial Office the amounts

lodged in the General Deposit Bank, as specified in the antecedent receipt.

Third. His Excellency the Marquis Del Pazo de la Merced, in the capacity of Minister of the Colonies, promises and undertakes, in the name of the State, that all the rights secured to the said Telegraph Construction and Maintenance, and Eastern Extension, Australasia and China Companies, shall be faithfully respected, and that the said Companies shall receive that is due to them, so long as they shall comply with the obligations which they have undertaken.

Fourth. This Capital is appointed as the common domicile of the contracting parties for any proceeding or negociation which may arise out of this contract.

And in this form they execute this deed of contract, binding their respective constituents in all legal form to comply with all the obligations hereinbefore specified.

In corroboration of which they signed, in the presence of Don José Valcarcel y Crespo, and Don Gregorio Diaz Borregon, of this city, duly qualified as they declare, and with cognizance of the matter.

I, the Notary proceed to make an exact recital of this deed, the contracting parties themselves declining to read it over, having been duly instructed of their rights in the matter, and I testify to all that is herein contained.

(Signed) JOSE ELDUAYEN.
WM. WARDEN MORICE.
JOSE VALCARCEL.
GREGORIO DIAZ.
LUIS GONZALEZ MARTINEZ.

I, Don Luis Gonzalez Martinez, Notary of this College, etcetera, do deliver this first copy on the day of the execution of the deed of contract, for the purpose of handing it to Mr. William Warden Morice, on one sheet, bearing the first stamp No. 8854, and twenty-one sheets of the eleventh, Nos. 1,687,826 to 7,829,47, remaining noted in the collection with the number 252 of register.

(Signed) LUIS GONZALEZ MARTINEZ.

27 I hereby certify that the preceding signature purporting to be that of Don Luis Gonzalez Martinez, Public Notary of this Capital, and of the Ministry of the Colonies, is the true and correct handwriting of same, in faith of which I hereto affix my name and the seal of my office.

Madrid, 8th March, 1879.

[L. S.] (Signed) WM. McPHERSON,
H. M's Vice-Consul.

LEGACION DE ESPAÑA EN LONDRES, *19th May*, 1879.

To the Managing Director of the Telegraph Construction and Maintenance Company.

SIR: I am instructed by the Spanish Government to forward to you the enclosed document concerning the laying down of a

telegraphic Cable between Manila and Hong-Kong. I am further desired to call your attention to the advisability of your appointing a representative of the Company at Madrid, to correspond directly with the Government, as stated in clause 19th of the Conditions for the Tender.

I am, Sir,
Your obedient Servant,
(Signed) MARQUIS DE CASA LAIGLESIA.

*Translation from the Spanish of Document Mentioned as Enclosed.

OFFICE OF THE COLONIAL MINISTER.

His Majesty's Minister Plenipotentiary in London informs the Minister of State as follows:—

"With reference to the Royal Order of the 17th of October last, which your Excellency was pleased to communicate to me (sub. No. 324), I have the honour to forward to you herewith a copy and translation of note which I have received from Lord Salisbury, in answer to the one I sent him on the 14th November, informing me that his Government was disposed to concede to His Majesty's Government the authorisation to lay down, at Hong-Kong, the projected Philippine Islands Telegraphic Cable. Nevertheless, the British Government's consent is made to depend on the concession on the part of Spain, of two privileges, viz., the usual one of priority of transmission of official telegrams, and the faculty on the part of England
28 of taking possession in case of emergency of the Station established in British territory on payment of a reasonable compensation."

The foregoing was, by Royal Order, communicated by the Colonial Minister, and I now communicate the same to you, Sir, in order that you may inform the Ministerial Office whether the Company which you represent agrees to accept the stipulated conditions on the part of the British Government, it being well understood that there is to be no derogation whatever with regard to the stipulations which served as a basis for the concession of such line, said stipulation being set forth in the Schedule of Conditions which was annexed to the Royal Decree of the 14th of December, 1878, and to the Royal Order of the 22nd of February of the present year.

God preserve you many years.
Madrid, 15th of April, 1879.
The Sub-Secretary pro tem.

E. DE CISNEROS.

To the Representative of the Telegraph Construction and Maintenance Company, London.

Translation.

Ministry of the Colonies.

General Direction of Public Works.

Telegraph Department.

His Excellency the Minister of the Colonies communicates to me the following:

The King, with the concurrence of the Council of State and of the Commission of the Telegraph Department, has been pleased to resolve as follows:—

1. That the route adopted by the contracting Companies for the laying of the Cable, fixing the landing place at Cape Bolinao, and following the tracing marked on the map presented by the same in conformity with Article 2 of the Schedule of Conditions of the 14th December, 1878, is approved.

2. That the above-mentioned Companies are authorised to lay the Cable, the specification of which accompanies the petition of Mr. Morice, in the event of the surveys taken in those seas showing that there are greater depths than 600 fathoms.

3. That there are not sufficient reasons given to induce the Government to except the modifications proposed of Articles 11, 12, and 15 of the aforementioned Schedule of Conditions.

29 4. That it is understood that the following words are added at the end of Article 13:—

Except it shall be proved that the delay was occasioned by force majeure or accident, and in that case, the period referred to shall be extended by one year.

I hand you this for your guidance, and God preserve you many years.

(Signed) DANIEL DE MARAZA,
Director-General.

Madrid, 26th January 1880.

Mr. William Warden Morice, Representative of the Telegraph Construction and Maintenance and the Eastern Extension, Australasia and China Telegraph Companies.

Company's Reply to Preceding Letter.

Telegraph Construction and Maintenance Company, Limited.

Offices 38 Old Broad Street.

LONDON, E. C., *May 21st*, 1879.

EXCELLENCY: I have the honour to acknowledge the receipt of your letter of the 19th instant, enclosing a communication from his

Excellency the Secretary of State for the Colonies at Madrid, with reference to the conditions with the British Government for allowing the landing of the Manila Cable at Hong-Kong.

I beg to state, on behalf of my Company, that we agree to be bound by the said conditions, namely:

That official messages of the British Government shall have priority of transmission at Hong-Kong, and that the British Government shall have the right, in case of emergency, to take possession of the Hong-Kong Station on payment of a reasonable sum.

I will thank you to inform His Excellency the Colonial Secretary, that my Company will forthwith appoint a representative at Madrid according to Article 19 of the Concession.

I have the honour to be

Your Excellency's obedient Servant,

(Signed) GEO. HENRY RICHARDS,
Vice-Admiral, Managing Director.

To His Excellency Marquis de Casa Laiglesia, &c., &c., Spanish Minister in London.

30–32 SCHEDULE B.

The Spanish Government to the Eastern Extension, Australasia and China Telegraph Company, Limited, Concession for the Construction, Establishment and Working of Three Submarine Telegraph Cables, Luzon-Panay, Negros, and Zebu.

Dated 14th April, 1897.

33 *Extract from the "Gaceta de Madrid."*

No. 115, Dated 25th April, 1897.

(Official Part.)

Ministry for the Colonies.

Statement of Motives.

MADAM: The importance of submarine telegraph communication in the Philippine Archipelago, and the necessity of establishing it between the principal Visayas Islands, which object has not been realised, in spite of the various "Concursos" held for the purpose, led your Majesty's Government to propose the announcement of a new "Concurso," for the construction and establishment of three Submarine Telegraph Cables between the Islands of Luzon, Panay, Negros and Zebu in those parts; and there was consequently published the Royal Decree of the 12th September last, which at the same time approved the general, technical and financial conditions the Concession of the said service had to subject itself to.

At the expiration of the term fixed for the said "Concurso," and within the same, two proposals were submitted for the construction and establishment of the Cables above mentioned—one for the construction and laying of the lines; and the other for their construction, establishment, working and maintenance for the period of twenty years.

The latter proposal being from the first deemed the more expedient for the interests of the State generally, and particularly for those of the service in question—both from the conditions of the cost of installation of the Cables and of the period offered for carrying it out, as well as from the offer to work the service at the expense and risk of the Company tendering—the Minister who has the honour of addressing your Majesty, agreeably to provision 3 of the General Conditions approved for the "Concurso," invited the author of the said proposal to improve it and completely adapt it to the conditions required for the case of the working of the lines as set forth in the approved Schedule.

In reply to this invitation the duly authorised representative of the Eastern Extension, Australasia and China Telegraph Company, Limited, who tendered for the construction and working of the said Cables, submitted a modification of the proposal before men-
34 tioned, improving it; and adjusting it to the conditions approved as regards the landing place of the Cables, and the distribution of the profits between the State and the Concessionnaire.

In addition, the above-mentioned Company offers a considerable reduction on the annual subsidy asked in the first proposal for the working of the service for twenty years, in exchange for retaining possession of the Cables after the expiration of the contract.

This modification is all the more advantageous, not only on account of the reduction in the subsidy, but mainly because, the Cables remaining the property of the Company which worked them after the expiration of the term of the working referred to, the lines will be maintained in the best condition, and the service could be continued by the same without the necessity for new "Concursos," or any subsidy from the State; and without limiting the Government's right of working at the said period other cables at its own expense, or establishing them in such manner as it may deem best for the interests of the service.

In virtue of what has been set forth above, the Royal Order of the 26th of February last was drawn up, accepting the Company's above-mentioned proposal for the establishment and working of the said Cables, with the modification proposed by the Company.

The said Company having deposited the definitive caution-money required, and accepted the schedule of conditions lastly drawn up for the concession of the Cables before mentioned in agreement with the Council of Ministers, the undersigned has the honour to submit for Your Majesty's approval the annexed decree.

Madam,

Your Majesty's most obedient humble servant,

(Signed) TOMÁS CASTELLANO Y VILLARROYA.

Madrid, 10th of April, 1897.

Royal Decree.

In conformity with the proposal of the Minister for the Colonies, and in accord with the Council of Ministers:

In the name of my August Son, King Don Alfonso XIII, and as Queen Regent of the Kingdom, I hereby decree as follows:

35 Article 1.

To Don Vicente Coromina y Marcellán, in the name and as the representative of the Eastern Extension, Australasia and China Telegraph Company, Limited, domiciled in London, is granted the Concession, subject to the annexed Schedule of Conditions, for the construction, establishment and working of three Submarine Telegraph Cables which will connect the Islands of Luzon, Panay, Negros and Zebu in the Philippine Archipelago.

Article 2.

The annexed Schedule of Conditions for the construction, establishment, working and maintenance of the Submarine Telegraph Cables specified in the preceding Article is hereby approved.

Article 3.

The Minister for the Colonies shall order the proper steps for the execution of the present Decree to be taken.

Given at the Palace, the 10th of April, 1897.

(Signed) MARIA CRISTINA.

(Countersigned:)
TOMAS CASTELLANO Y VILLARROYA,
Minister for the Colonies.

(No. 141.)

Deed of Concession for the Construction, Establishment, and Working of Three Submarine Telegraph Cables.

In the City and jurisdiction of Madrid, the 14th of April, 1897—Before me, Don Antonio Turón y Boscá, Doctor of Civil, Canon and Administrative Law, Academic Professor of that of Jurisprudence and Legislation, Advocate and Notary of the Illustrious Colleges of this Capital, with residential rights and fixed residence in the same; after due official summons, in the office of the Most Excellent Señor The Minister for the Colonies, there appeared Of the one part The Most Excellent Señor Don Tomás Castellano y Villarroya, of age, widower, Minister for the Colonies, and as such acting as the representative of the State. He did not submit any Ticket of
36 Registration, being exempted from so doing under the provisions of the Royal Order, dated 23d of March, 1875.

And of the other part Señor Don Vicente Coromina y Marcellán,

of age, widower, Agent residing in this jurisdiction, and provided with a Ticket of Registration of the 5th Class, dated the 4th of September last, bearing the consecutive number 956. He appeared as the representative of the Eastern Extension, Australasia and China Telegraph Company Limited, domiciled in London; under the Power of Attorney executed in his favour, in the said City of London, bearing the date of 11th of July, 1895, in the presence of John Venn, Notary Public, by Messieurs J. Denison Pender, Director, and F. E. Hesse, Secretary of the said Company, an official translation of which made by the Office for the Translation of Languages of the Ministry of State is inserted verbatim below, in order to accredit in all cases the capacity and powers of the gentleman in whose favour the Power of Attorney is drawn up, the text of which is as follows:—

Translation.

Know all Men by these Presents: That the Eastern Extension, Australasia and China Telegraph Company, Limited, whose Offices are at Winchester House, in the City of London, in England, doth hereby constitute and appoint Señor Vicente Coromina, of the City of Madrid, the Agent and Attorney of the said Company at Madrid, for the special purposes of officially representing the Company, and acting for or on behalf of the Company in all matters and things which may hereafter arise between the Government of His Majesty the King of Spain, or Her Majesty the Queen Regent of Spain and the Company, touching the Luzon-Hong-Kong Cable, established by the Company in pursuance of and in accordance with a certain Concession and Royal Decree for the laying and working of the said Cable: and generally in connection with the establishment of Telegraphs in any other of the Colonies or Dependencies of His said Majesty in the East: and whatsoever the said Agent and attorney shall lawfully do by virtue — these Presents the said Company agrees to ratify.

Lastly, the company hereby revoke all Powers of Attorney previously given to any person for the purposes above mentioned.

37 In Witness whereof the said Company hath hereunto caused its Common Seal to be affixed, this 11th day of July, 1895.

The Common Seal of the Eastern Extension, Australasia and China Telegraph Company, Limited, was hereunto affixed in the presence of

(Signed) J. DENISON PENDER, *Director.* [SEAL.]
(Signed) F. E. HESSE, *Secretary.*

I, John Venn, of the City of London, Notary Public, duly admitted and sworn, practising in the said City, Do Hereby Certify and Attest that on the day of the date hereof the Common Seal of the Eastern Extension, Australasia and China Telegraph Company, Limited, was affixed to the foregoing Power of Attorney, in pursuance of a Resolution of the Board of Directors of the said Company, in my presence, and in that of John Denison Pender, Esq., one

of the Directors, and Frederick Edward Hesse, Esq., the Secretary of the said Company: and that the said Director and Secretary signed in my presence at foot of the said Power of Attorney as witnessing the affixing of the said Seal.

In Witness whereof I have hereto set my hand and affixed my Seal of Office, in London, this 11th day of July, 1895.

[SEAL.] (Signed) JOHN VENN,
Notary Public.

Examined and found correct for the legalisation of the signature and seal as above, which appear to be those used by Mr. John Venn, Notary Public in this City, London, 11th July, 1895.

[SEAL.] URBANO MONTEJO,
Consul-General (with Rubric).

No. 2951.

Examined at this Ministry of State for the purpose of legalising the signature of Don Urbano Montejo, Consul-General in London.
Madrid, 28th September, 1896.
By the Under Secretary the Charge d'Affaires of the Chancellery.
[SEAL.] M. PASTOR Y BEDOYA (with Rubric).

38 The Translation, continuing.

Further says: Dated 11th July, 1895. The Eastern Extension, Australasia and China Telegraph Company, Limited. Power of Attorney in favour of Senor Vicente Coromina, for the purpose of representing the Company in Madrid, in relation to the Luzon and Hong Kong Cable, and other telegraph matters. The head of the Archives, Library and Translation of Languages Department of the Ministry of State.—I hereby certify that the preceding translation of a Power of Attorney, drawn up in English, submitted to me for this purpose, is a faithful and literal one.
Madrid, 5th October, 1896.

[Seal of the Department of the Translation of Languages of the Ministry of State.]

MANUEL DEL PALACIO, with Rubric.

This is according to the original, which has been before me in the drawing up of this Deed, and from which I quote in every case.

And the appearers having in my opinion the necessary legal capacity to act in and about the matters above recited, and which capacity they assert not to have been restricted, for the purpose of executing the present Deed of Concession for the establishment and working of the Submarine Telegraph Cables which will connect the islands of Luzon, Panay, Negros and Zebu in the Philippine Archipelago, set forth the following facts:—

Firstly, That under date of the 12th September, 1896, and in No. 258 of the Gaceta de Madrid dated the 14th of the same month and year, there was published the Royal Decree, which reads literally as follows:—

In conformity with the proposal of the Minister for the Colonies, and in accord with the Council of Ministers:

39 In the name of my August Son, King Don Alfonso XIII, and as Queen-Regent of the Kingdom, I hereby decree as follows:—

That a free public "Concurso" should be announced for the construction and establishment of three Submarine Telegraph Cables, to connect the islands of Luzon, Panay, Negros and Zebu, in the Archipelago of the Philippines, subject to the Schedule of Conditions approved at this date and published in the Gaceta de Madrid, conjointly with the present Decree.

Given at San Sebastian, the 12th September, 1896.

(Signed) MARIA CRISTINA.

Countersigned:)

TOMÁS CASTELLANO Y VILLARROYA,
Minister for the Colonies.

**Schedule of Conditions, General, Technical, and Financial, for the Construction and Establishment of Three Submarine Telegraph Cables, to Connect the Islands of Luzon, Panay, Negros, and Zebu of the Philippine Islands.*

General Conditions.

1. Tenders will be received from private individuals, or companies, for the construction and establishment of the above-mentioned Submarine Telegraph Cables; and, optionally, for their working. The said Tenders shall be submitted open at the Ministry of the Colonies within the period of 90 days from the publication of this Schedule in the Gaceta de Madrid, accompanied by the receipt for the deposit with the "Caja General de Depositos" of 50,000 pesetas in cash, or in Government Funds allowed in such cases, as a provisional guarantee for the carrying out of the Tender, to meet the eventuality of the adjudication of the service. The definite caution-money to be deposited by the Adjudicatee shall be 100,000 pesetas made up in the same way as before, and it shall form a guarantee for the carrying out in all its parts of the Contract entered into.

2. The selection of the Tender to be accepted having been confirmed, the definitive caution-money shall be deposited within fifteen days, reckoning from the date on which the service shall have been adjudicated to the respective Concessionnaire. The amounts of the provisional deposits in respect of the rejected Tenders shall be (forthwith) returned.

40 3. The Minister for the Colonies reserves to himself the right of accepting the Tender which he considers most advantageous; of rejecting all should he not deem any acceptable; or,

* Extract from Gaceta de Madrid, No. 258, dated 14th September, 1896.

of inviting the author of the one he considers the best to improve it, in order to adjudicate to him the Concession for the Cables, subject to such variations as may be agreed upon for the purpose.

The acceptance of the Tender which may be definitely approved, on the proposal of the Minister for the Colonies, shall be made at a Council of Ministers, the fact and text of such decision to be published in the Gaceta de Madrid, the accepted Tender to be raised in the meantime to a Public Deed and completed in the presence of the Notary who draws it up for that purpose.

4. The Adjudicatee of the above-mentioned service shall be bound by the decisions of the Authorities and Administrative Tribunals in all questions which may arise between him and the Administration.

5. The Concessionnaire shall bear the cost of drawing up the Contract Deed and Concession for the construction and laying of the Cables, as well as the expense of a first copy which will have to be handed in at the Office of the Ministry for the Colonies.

6. The Concessionnaire shall have duly authorised representatives in Manila and Madrid, possessed of sufficient powers to bind themselves on his behalf in their relations with the Government-General of the Philippines, and with the Central Administration at the Ministry for the Colonies.

7. In order for the Tenders, which may be submitted for the construction and establishment of the said Cables and for their working respectively, to be eligible, it is necessary, in addition to their being accompanied with the receipt referred to under No. 1 of the General Conditions, that the party tendering should declare his acceptance of all the remaining conditions of this Schedule: and that the competing parties should have the legal power to bind themselves; and that those who sign on behalf of other persons or Companies substantiate their agency in due form.

Technical Conditions.

Article 1.

The Cables shall start:—

The first,—that from Luzon to Panay,—from a point *of* the coast of Tayabas, the nearest possible to the town of Lucena; and
41 terminating if practicable at the town of Capiz, in the second of the above mentioned islands.

The second,—from the port of Iloilo in Panay,—terminating at that of Bacolod, in the island of Negros.

The third,—from the town of Escalante, on the east coast of Negros,—terminating at that of Tuburán, on the west coast of Zebu.

The length of these Cables, taken at the sea level, is estimated at 170 miles for the first, 24 miles for the second and 13 miles for the third, for each of which a maximum of 15 per cent. additional is allowed for slack.

Article 2.

The definite landing points and the route of the Cables shall be settled by mutual agreement between the Contractor and the technical functionaries of the State commissioned for the purpose, in accordance with the preliminary soundings and surveys of the coasts and sea-bottom, which precede the submersion of the cables, and which shall be carried out at the season or period which the Concessionnaire of the service specified may deem best.

By virtue of these studies, and in the event of the Tender not comprising the working of the service, the lengths of the Shore End, Intermediate and Deep Sea Cable sections which shall go from island to island shall also be decided in like manner; for which purpose, the ship charged with the laying shall carry the different types of Cable coiled in the manner required for their being laid in the order previously agreed upon.

The Contractor undertakes to supply the Administration before the definitive taking over of the Cables with a copy in duplicate of the chart signed by the Government Commissioners, showing in detail the route followed by the Cables and an outline of the bottom on which they are laid; indicating also the lengths of the different types of Cable laid.

Article 3.

A Government ship shall be present at the surveys and laying of the cables if the exigencies of the Naval Station of the Philippines will allow of it, and, if necessary, will indicate the route agreeably to the course chosen.

42 Article 4.

The cables shall be constructed conformably with the latest improvements. The contractor shall hand in at the office of the Ministry for the Colonies two samples of the types of Cables manufactured, which are deemed necessary for the above mentioned service, with an explanation with regard to their conditions; upon all of which the Consulting Committee of Telegraphs shall inform themselves.

Article 5.

The Contractor shall establish in the neighborhood of the landing places the mark buoys or beacons which may be requisite to show the route of the Cables, and shall leave duplicates in store.

Article 6.

The Contractor in the event of his Tender not comprising the working, shall, at each of the Stations nearest to the landing places, hand over such instruments and apparatus as may be necessary for the purpose of taking tests, and working and maintaining the Cables; together with a detailed list of all that is supplied for the said purpose.

Article 7.

The Contractor shall address the delegates of the Government direct, both on the matters and unforeseen incidents which may

arise in the manufacture, laying, taking over and repairs of the Cables, as well as on those relating to the carrying out of the Contract.

Article 8.

The Contractor shall admit on board the ship or ships which make the surveys, or lay or repair the Cables, the delegate of the Government, and other officials whom it may appoint for the purpose of watching the operations.

Financial Conditions.

1. The parties tendering shall offer:—

a. Simply to carry out the construction and establishment of the three Cables, or

b. To construct, lay and work them on their own account.

2. In both cases the Tender shall specify the maximum period by which the Cables shall be established in perfect working
43 order, reckoning from the date on which the Concession of the said service is granted.

The Concession shall ipso facto become forfeited, with the loss of the caution-money, in event of the Cables not being established within the period and under the conditions specified in the preceding paragraph.

3. It is understood that the installation comprises, at the expense of the Concessionnaire, the construction and establishment of cable houses at the landing points of the Cables; the mark-buoys or beacons pointing out the route of the same; the branch lines to connect them with the stations; as well as the instruments, batteries and working appliances, and the materials for joining up for testing, and for the general service of the lines.

4. For all legal purposes the service shall be considered as a work of "public utility," and the Submarine Telegraph Cables shall be exempt from Customs Dues, after compliance with the Customs Ordinances laid down conformably with the provisions of Article 3 of the Tariff in force in the Philippines.

Particulars of Case A.

5. In the event of the Tender comprising solely the construction and establishment of the Cables, the cost of the above-mentioned service shall be set forth. The said amount shall be paid in four equal instalments,—the first on the provisional taking over of the Cables, and the others in each of the three years following.

6. The Tender shall in the same way set forth the form and mode of making the payment of each instalment; the State always, however, retaining the power of paying up in advance the amount required for completing the payment of the work, with the deduction of the 5 per cent. per annum interest for the period so paid in advance for the time wanting to the due date of the instalment.

7. The parties tendering shall likewise have the power of stating in their Tenders the amount which the State shall pay them for the

working of the service during the term of the guarantee, which they may specify, in order to assure the proper working of the Cables.

8. They shall decide in that case whether they shall provide (or not) a telegraph ship for the repair of the damages or faults which may occur to the Cables after the expiration of the specified period, as a guarantee of their installation; and shall in that case fix the amount to be paid to them for the service above mentioned.

9. As soon as the Cables are laid they shall be provisionally taken over by the Government functionaries deputed for the purpose, and on their being satisfied that the Cables as well as the instruments (apparatus), cable-houses, and everything requisite for the proper carrying out of this service, comply with the conditions stipulated in this Schedule—the minutes of the provisional taking over shall be drawn up.

10. Starting from the date of the provisional taking over of the Cables, will commence the period of guarantee set forth in the Tender, during which the repair of the damages and faults which may occur in any of the Cables, or in the accessories and apparatus connected therewith, shall be carried out at the sole expense of the Contractor, unless it is proved that these defects have arisen from causes beyond control (force majeure). In such cases a Technical Commission, nominated by the Governor-General of the Philippines, shall decide, without appeal, respecting the causes of the damages which may arise, after hearing the technical representative of the enterprise.

11. During the term of the guarantee the Contractor shall be bound to maintain at his expense an electrician inspector at each of the six stations of the landing places of the Cables—whose staff shall direct during the said period the manipulation and see to the maintenance of the Cables and the apparatus belonging to them, the service of the same being carried on under his instructions.

12. On the expiration of the above mentioned period of guarantee, the Cables and all the apparatus and accessories set forth in the list referred to in No. 6 of the Technical Conditions shall be definitely taken over, and in the event of everything being found in perfect working order, the minute drawn up by the Governor-General of the Philippines shall be approved. On this being reported to the Ministry for the Colonies, that Department shall order the return of the definitive caution-money deposited by the Concessionnaire.

13. In the event of the Tender comprising the service for the repair of the Cables after the expiration of the period of guarantee, the Treasury of the Philippines shall pay the enterprise for each day of service of the ship and its staff the amount specified in the Tender, from the day preceding that on which the repairing operations begin till two days after that on which, both days inclusive, the Government delegate (who shall be present at the repairing operations) shall certify that the repair has been completed.

14. The receipts taken during the period of the guarantee shall belong to the State.

Particulars of Case B.

15. In the event of the Tender comprising, in addition to the construction and establishment of the Cables, their working by the Concessionnaire, the subsidy and mode of its payment shall be specified, and may be arranged in one of the following ways:

a. By the payment of a fixed amount in one or several instalments, the profit of the working to be divided between the Concessionnaire and the State in such proportions as may be offered.

b. By a guarantee of interest on the capital invested in the construction of the Cables, the profits of the working to be reckoned as an integral part of the interest mentioned.

c. By an annual payment during the period of the working, the profits in this case also to be divided, in the proportion which may be offered, between the State and the Concessionnaire.

16. The Concessionnaire shall submit the Tariff for the carrying out of the service of the Cables, it being understood that the transmission of official telegrams shall be obligatory—taking precedence—and at least at half the rates charged for private despatches.

17. The period of the installation of the Cables as well as that of their working by the Concessionnaire, shall be specified by him in the Tender which he submits for the purpose. It is understood that the term of the working of the said service begins from the taking over of the Cables and their accessories.

As soon as the Cables are laid they shall be taken over by the Government functionaries nominated for this purpose, and upon it being shown that the Cables, together with the instruments, cable-houses, and everything requisite for carrying out the service mentioned meet all the conditions specified, the Deed of the said taking over shall be drawn up and executed; and upon being
46 approved by the Governor-General of the Philippines, and such approval being notified to the Ministry for the Colonies, the latter Department shall order the return of the caution-money deposited by the Concessionnaire.

18. The amount of the subsidy shall be paid monthly at Manila by the "Caja de la Tresoira Central."

19. The telegraphists and other employés in the service of the Cables shall be appointed by the Concessionnaire, but in the exercise of their functions they shall be subject to the Rules and Regulations established for the official service of this Department in the Philippine Islands.

20. The Government and supreme authorities of those Islands shall enjoy the right of inspecting the correspondence of every kind; and shall have the power of refusing to forward telegrams, whether those handed in for transmission or those received by the line, in the event of their contents being contrary to good morals or prejudicial to the safety of the State or to public order, and also of prohibiting cypher or code messages in all correspondence of a private character.

21. In the event of the conductors becoming useless from causes beyond the control of the Enterprise, during the term of the Contract, it undertakes to replace them, so that communication is again restored within a period not exceeding three months. On the

expiration of this period, should the repair not be effected, the subsidy shall be suspended until the service has been re-established; and should six months further pass without its being restored, it shall be understood that the subsidy lapses entirely.

22. Should the service of the Cables be interrupted, totally or partially, for a period exceeding one month, from any cause attributable to the negligence or bad organisation and system of the Enterprise, whether proceeding from defective apparatus or from its technical or administrative department, the Government shall have power to take charge of the Cables and of the service provisionally, and to receive the products of their working; these shall be handed back to the enterprise at the proper time, after deducting the cost of the official administration and that of the maintenance and repair, or modification and change of apparatus which may
47 have been necessary. The service shall continue to be carried on by the State as long as the Enterprise fails to reorganise the service in a proper manner, it being understood that the Concession lapses in the event of the total interruption of the service on the part of the Enterprise exceeding one year.

23. Special regulations shall fix, in accord with the Concessionnaire, what may be deemed proper in respect to the application of the tariff to be in force for the transmission by the enterprise of private telegrams; and shall specify the guarantee that he shall give for the payment of the portion of the rates on the dispatches which it may receive and forward over the Government Telegraph Lines.

24. Six months before the termination of the period of the working of the service by the Concessionnaire there shall be drawn up in triplicate a detailed inventory of the Cables, apparatus and all accessories, specifying the condition in which they are—the respective certificate to be signed by the Delegate of the Administration, and the Concessionnaire, who shall retain a copy of the same and of the inventory—handing over one to the Governor-General of the Philippines, and forwarding the third one to the Ministry for the Colonies.

Approved by Her Majesty. TOMÁS CASTELLANO.

Secondly, That on the 12th December last, the appearer Don Vicente Coromina, acting as Agent, submitted the following proposal (published in the Gaceta de Madrid, No. 59, dated 28th February, 1897):—

Don Vicente Coromina y Macellán, the Representative of the Eastern Extension, Australasia and China Telegraph Company, Limited, specially authorised for the purpose by the Board of the said Company, agreeably to the statement of the accompanying enclosure; as well as to the receipt No. 53, which shows the deposit of 50,000 pesetas required by the Schedule of Conditions for the "Concurso" published in the Gaceta de Madrid dated the 14th September last, for the construction and establishment of three Submarine Telegraph Cables to connect the islands of Luzon, Panay, Negros and Zebu—of the Philippine group—has the honour to submit for the approval of his Majesty's Government the following proposal for the carrying out of this work, undertaking to execute it under the following condition:—

48 The Company shall establish, at its own expense, submarine telegraph communication between Manila and Panay,

between Panay and Negros, and between Negros and Zebu, within the period of nine months, reckoning from the date of the signature of the Contract; and shall retain the ownership of the Cables, the working and maintenance of the same being also consequently at its expense. The Company asks in exchange:—

An annual subsidy of £5,000 (five thousand pounds sterling) for a period of twenty years; or a proportionately larger sum for a period of ten years, should this suit the Government better; or the concession of the (exclusive) privileges and exemptions treated of by the annexed communication respecting the Company's new proposals for the extension of the Hongkong-Bolinao Cable to Manila.

The Company shall transmit official dispatches over these Cables as an obligatory service, enjoying precedence, at half the rates established for private dispatches.

The Company fixes a uniform rate of 50 centimes of a franc per word for all the Visayas Cables; to which tax the Government shall decide the amount to be added for the transit over the land line system.

Madrid, 12th December, 1896.

VICENTE COROMINA.
The Company's Representative.

Thirdly. The party tendering accompanied the foregoing proposal with a receipt issued by the Treasurer-General of Deposits, showing that the required deposit of 50,000 pesetas had been made, which document reads as follows:—

Volume 1st. No. 53.—Receipt No. 253,119.—Register No. 10,978.—Treasury-General of Deposits.—Chief Treasury Cash Deposit.—Transferable.—Provisional for "Subastas."

The firm of D. E. Sáinz and Sons has, out of its own means, on account of Messrs. Samuel Montagu and Company, of London, on behalf of the Eastern Extension, Australasia and China Telegraph Company, Limited, of London, and as a guarantee required in the free public "Concurso" announced in the Gaceta de Madrid, dated the 14th of September (1896), for the establishment of the Visayas Cables (Philippine Islands), paid into the class of deposits above-mentioned the amount of the 50,000 pesetas in cash,
49 which will be returned to it under the proper formalities, on the presentation of this receipt in the event of the Concession of the said service not being adjudicated to the depositor. The General Revenue Department shall take note of this receipt, which bears no correction, failing which noting it shall have no [binding] force nor value.

Madrid, 14th of December, 1896.

There are 50,000 (fifty thousand) pesetas.

For the Chief Treasurer,
[Signature illegible. Take note hereof.]

For the Chief Comptroller,
(Signed) RAMON DE ISLA.

Entered in General Revenue Office.
(Signed) T. GOMEZ.

Entered in Treasury Office.
(Signed) RODRIGUEZ.
(All with Rubric.)

Fourthly. Two Proposals having been presented, one for the construction simply, and the other for the construction and working of the said Cables; this second being considered the most desirable for the said service, the Company making the Tender was invited to improve its proposal and to adapt it still better to the conditions of the "Concurso."

The Eastern Extension Australasia, and China Telegraph Company, Limited, accordingly improved and modified its proposal in the following terms:—

Nothing having been specifically settled at the "Concurse" as to the Cables after the expiration of the Contract being the property of the party tendering; and having regard to the fact that the Company desires to retain their ownership even after this period, it offers a reduction of £500 (five hundred pounds) per annum on the amount of £5,000 (five thousand pounds) previously asked as subsidy.

The reasons which led the Company to propose the landing of the Panay Cable at Manila no longer existing, it now offers to lay the Cables between Luzon and Panay, Panay and Negros, and Negros and Zebu.

The Company shall pay the State the 10 per cent, which, by the application of the uniform rate of 50 centimes of a franc per word, the Visayas Cables yield; after first deducting the amount of the expenses for the maintenance of the six stations, reckoned at
50 £6,000 (six thousand pounds) per annum. It is understood that the said rate shall be the only one to be applied to the telegrams transitting over these Cables, as no other Terminal or Transit Tax shall be imposed.

The Company trusts that the Government will grant it sufficient offices for the service of the six stations, or in default thereof lands (or plots of ground) to enable it to build such on.

Madrid, 11th of February, 1897.

(Signed) VICENTE COROMINA,
The Company's Representative.

A true copy.

(Signed) G. J. DE OSUNA,
Under-Secretary.

(The foregoing is the text published in No. 59 of the Gaceta de Madrid, before mentioned.)

Fifthly. That by Royal Order of 26th February last, addressed to the Governor-General of the Philippine Islands, the proposal and modification of the before-mentioned Company were accepted in the terms which the said Royal Order contains, and which read as follows:—

MOST EXCELLENT SIR: The proposals which were submitted at the "Concurso" for the construction, establishment and working of the Submarine Telegraph Cables which will connect the Islands of Luzon, Panay, Negros and Zebu of that Archipelago, referred to by the Royal Decree and Schedule of Conditions approved on the 12th September last for the adjudication of the said service, having been examined;

Whereas the proposal submitted by the Eastern Extension, Australasia and China Telegraph Company, Limited, is the most advantageous one, and that on being invited to do so, the said Company improved its proposal under Provision 3 of the General Conditions approved for the "Concurso," agreeably to the modification submitted on the 11th instant;

51 His Majesty the King (whom God preserve), and in his name the Queen Regent of the Kingdom, has been pleased to ordain, in accord with the Council of Ministers, that the proposal of the Eastern Extension, Australasia and China Telegraph Company, Limited, domiciled in London, dated the 12th December, 1896, for the construction, establishment, working and maintenance of the Telegraph Cables specified, be accepted as set forth by the first of the three modes which the Company submits in the said proposal—that is to say, by means of the payment of an annual subsidy for a period of twenty years, which the modifications set forth in its communication dated the 12th instant; the Cables, to which the Royal Decree of the 12th September, 1896, refers, starting from the points indicated in the first of the Technical Conditions of the Schedule approved for the "Consurso" for adjudication of this service; and the tariff or respective rates for the working of the same to be settled in due time.

I communicate this by Royal Order to Your Excellency for your guidance and the due legal effects: this resolution to be published in the Madrid and Manila Gazettes. May God guard your Excellency many years.

Madrid, 26th February, 1897.

(Signed) CASTELLANO.

To the Governor-General of the Philippine Islands.

Sixthly, That in fulfillment of the conditions exacted by the State, the Eastern Extension, Australasia and China Telegraph Company, Limited, increased the deposit made as guarantee, to the amount of 100,000 (one hundred thousand) pesetas,—that is to say, by the payment of a further 50,000 (fifty thousand) pesetas, as appears from another receipt of the Treasury-General of Deposits, which reads verbatim as follows:

Volume 15th.—No. 152.—Receipt No. 254,677.—Register No. 52,179.—Treasury-General of Deposits.—Chief Treasurer.—Deposit in hard cash.

Don Vicente Coromina y Marcellàn, on behalf of the Eastern Extension, Australasia and China Telegraph Company, and in order to complete the caution-money required by the "Concurso"

52 published by Royal Decree of the 12th September, 1896, for the establishment of the Visayas Cables (Philippines), has paid in at the disposal of the Ministry for the Colonies, in the class of deposits above mentioned, the sum of 50,000 (fifty thousand) pesetas in cash, which will be returned to him on the undertaking to which it refers being brought to a termination; with interest at the rate of — per cent. per annum, from the present day to that exclu-

sive of its return. The General Revenue Office shall take note of this receipt, failing which it shall be without (binding) force or value.

Madrid, 9th, March, 1897.

There are 50,000 (fifty thousand) pesetas.

For the Chief Treasurer,

[Signature illegible. Take note hereof.]

(Signed) SANDALIO GRANJA,
Chief Comptroller.

Entered in the Grand Revenue Office,

(Signed) J. GOMEZ RENOVALES.

Entered in the Treasury Department,

(Signed) RODRIGUEZ.

(All with Rubric.)

Seventhly, That by Royal Decree dated the 10th instant, the Concession in question is granted to the Company so often mentioned, subject to the Schedule of Conditions accompanying the said Royal Decree, both of which documents now follow and read verbatim:—

Royal Decree.

In conformity with the proposal of the Minister for the Colonies, and in accord with the Council of Ministers:

In the name of my August Son, King Don Alfonso XIII, and as Queen Regent of the Kingdom, I hereby decree as follows:—

53

Article 1.

To Don Vicente Coromina y Marcellán, in the name and as the representative of the Eastern Extension, Australasia and China Telegraph Company, Limited, domiciled in London, is granted the Concession, subject to the annexed Schedule of Conditions, for the construction, establishment and working of three Submarine Telegraph Cables which will connect the Islands of Luzon, Panay, Negros and Zebu in the Philippine Archipelago.

Article 2.

The annexed Schedule of Conditions for the construction, establishment, working and maintenance of the Submarine Telegraph Cables specified in the preceding Article is hereby approved.

Article 3.

The Minister for the Colonies shall order the proper steps to be taken for carrying out the present Decree.

Given at the Palace, this 10th day of April, 1897.

(Signed) MARIA CRISTINA.

(Countersigned:)

TOMÁS CASTELLANO Y VILLARROYA,
Minister for the Colonies.

54 *Schedule of Conditions for the Establishment and Working of the Submarine Telegraph Cables Which Will Connect the Islands of Luzon, Panay, Negros, and Zebu, in the Archipelago of the Philippines.*

Article 1.

The Cables shall start as follows:—

The first.—that from Luzon to Panay.—from a point of- the coast of Tayabas the nearest possible to the town of Lucena, and terminating if practicable at the town of Capiz, in the second of the above mentioned islands.

The second.—from the port of Iloilo, terminating at that of Bacolod, in the Island of Negros.

The third.—from the town of Escalante on the east coast of Negros, and terminating at the town of Tuburán, on the west coast of Zebu.

Article 2.

The definitive landing points and the route of the Cables shall be settled by mutual agreement between the Contractor and the technical functionaries of the State commissioned for the purpose, in accordance with the preliminary soundings and surveys of the coasts and sea bottom which precede the submersion of the Cables, and which shall be carried out at the season or period which the Concessionnaire of the service specified may deem best.

Article 3.

A Government ship shall be present at the surveys and laying of the Cables if the exigencies of the Naval station of the Philippines will allow of it, and, if necessary, will indicate the route agreeably to the course chosen.

Article 4.

The Contractor shall admit on board the ship or ships which make the surveys, or lay or repair the Cables, the delegate of the Government and other officials whom it may appoint for the purpose of watching the operations.

55 *Pliego de Condiciones Para el Establecimiento y Explotación de los Cables Telegráficos Submarinos Que Han de Unir las Islas del Luzón, Panay, Negros, yCebù, del Archipielago de las Filipinas.*

Artículo 1.°

Los cables Partirán:—

El Primero, ó sea el de Luzón á Panay, de un punto de la costa de Tabayas, lo más próximo posible al pueblo de Lucena, para terminar, á ser factible, en el mismo pueblo de Capiz en la segunda de las citadas islas.

El Segundo, del puerto de Iloilo en Panay, y terminará en el de Bacolod, en la isla de Negros.

El Tercero, del pueblo de Escalante, en la costa Oriental de Negros y terminará en el de Tubarán en la costa Occidental de Cebú.

Artículo 2.°

Los puntos definitivos de amarre y el trazado de los cables se fijarán de común acuerdo entre el contratista y los funcionarios facultativos del Estado commisionados al efecto, mediante los estudios de sondaje y reconocimiento de costas y fondes, el que habrá de preceder á los trabajos de immersión de los cables, y habrá de verificarse en la época ó perído que se estime mejor por el concesionario del expresado servicio.

Artículo 3.°

Un buque del Estado asistirá á los estudios y trabajos de colocación de los cables, si las atenciones del Apostadero de Filipinas lo permiten, y en caso necesario marcará la derrota con arreglo al trazado elegido.

Artículo 4.°

El contratista admitirá á bordo del buque ó boques que verifiquen los estudios ó tiendan ó reparen los cables, al Delegado del Gobierno y demás comisionados que éste designe para inspeccionar las operaciones.

56 Article 5.

The definitive caution-money of 100,000 (one hundred thousand) pesetas having been deposited within the period of fifteen days, as specified in No. 2 of the General Conditions of the "Concurso," the Deed of the Adjudication of the service shall be notarily drawn up and executed. The said caution-money shall serve as a guarantee for the fulfilment of all the conditions of the Contract until all the Cables are duly laid and taken over.

Article 6.

The maximum period for the Cables being established in perfect working order shall be nine months, reckoning from the date of the adjudication of the service. The Concession shall lapse and the caution money be forfeited should the Cables not be duly laid within the period specified.

Article 7.

It is understood that the installation comprises, at the expense of the Concessionnaire, the construction and establishment of cable-houses at the landing points of the Cables; the mark-buoys or beacons pointing out the route of the same; the branch lines to connect them with the stations; as well as the instruments, batteries and working appliances, and the materials for joining up for testing, and for the general service of the lines.

Article 8.

For all legal purposes the service shall be considered as a work of "public utility," and the Submarine Telegraph Cables shall be exempt from Customs Dues, after compliance with the Customs Ordinances laid down conformably with the provisions of Article 3 of the Tariff in force in the Philippines.

Article 9.

The Concessionnaire undertakes to work, at his own expense and risk, the Cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the Cables and their adjuncts in perfect working order.

57

Artículo 5.°

Constituída la fianza definitiva de 100,000 pesetas prestada por el adjudicatario, dentro del plazo de quince dias, á que se refiere la condiciòn 2.ª de las generales del concurso, se otorgará a escritura de la adjudicación del servicio. Dicha fianza responderá del complimiento de todas las condiciones del contrato hasta la completa instalaciòn de los cables y aprobaciòn de su recepción.

Artículo 6.°

El plazo máximo dentro del cual deberàn quedar instalados los cables en perfecto estado de uso, será el de nueve meses, á partir de la fecha en que se adjudique el servicio. La concesión caducará con perdida de la fianza sino quedarán instalados los cables dentro del indicado plazo.

Artículo 7.°

Se entenderán comprendidos en la instalacion y á cargo del concesionario la construcción y establecimiento de las casetas de amarre en los extremos de los cables; los de las boyas ó valizas que indiquen la direccion de éstos; las ramales de línea para unirlos con las estaciones, así como los de los aparatos, pilas, accesorios de montaje y los útiles de empalmar para el servicio de pruebas y de conservación de las líneas.

Artículo 8.°

Este servicio se considerará como obra de utilidad pública para todos los efectos legales. Los cables telefícos submarinos se hallan libres de derechos arancelarios, previo el cumplimiento de lo que determinan la Ordenanzas de Aduanas, con arreglo á la disposición 3.ª del Arancel vigente en Filipinas.

Artículuo 9.°

El concesionario se obliga á explotar por su cuenta y riesgo los cables de esta concesión, durante un período de viente años, empezando á contarse dicho plazo, á partir de la recepción de los cables y sus anejos, en perfecto estado de uso.

58

Article 10.

The Concessionnaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the Cables, the said payments being made at Manila by the "Caja de la Tesoreria Central" (Chief Treasury Office) of those Islands.

Article 11.

As soon as the Cables are laid they shall be taken over by the Government functionaries nominated for this purpose, and upon its being shown that the Cables, together with the instruments, cable-houses, and everything requisite for carrying out the service mentioned meet all the conditions specified, the Deed of the said taking over shall be drawn up and executed; and upon being approved by the Governor-General of the Philippines, and such approval being notified to the Ministry for the Colonies, the latter Department shall order the return of the caution-money deposited by the Concessionnaire.

Article 12.

The telegraphists and other employés in the service of the Cables shall be appointed by the Concessionnaire, but in the exercise of their functions they shall be subject to the Rules and Regulations established for the official service of this Department in the Philippine Islands.

Article 13.

The Government and supreme authorities of those Islands shall enjoy the right of inspecting the correspondence of every kind; and shall have the power of refusing to forward telegrams, whether those handed in for transmission or those received by the line, in the event of their contents being contrary to good morals or prejudicial to the safety of the State or to public order, and also of prohibiting cypher or code messages in all correspondence of a private character.

Article 14.

In the event of the conductors becoming useless for causes beyond the control of the Enterprise, during the term of the Contract, it undertakes to replace them, so that communication is again restored within a period not exceeding three months. On the

59

Artículo 10.

El concesionario disfrutará de una subvención anual de curtro mil quinientas libras esterlinas, abonadas mensualmente por dozaves partes, durante todo el plazo de la explotación de los cables, y haciéndose dicho abono en Manila por la Caja de la Tesoriría Central de aquellas islas.

Artículo 11.

Una vez instalados los cables, ce hará la recepción de los mismos por los funcionarios del Gobierno que al efecto se deleguen, y comprobado que reunen las condiciones estipuladas, asi como los aparatos, casetas de amarre y todo lo necesario para el indicado servicio, se extenderá el acta di dicha recepción, la que, aprobado por el Gobernador general de Filipinas, y dada cuenta de la aprobación al Ministeria de Ultramar, se dispondrá por éste la devolución de la finanza prestada por el concessionario.

Artículo 12.

Los Telegrafistas y demás empleados al servicio de los cables serán elegidos por el concesionario, pero quedarán sujetos en el ejercicio de sus funciones á las disposiciones reglamentarias establecidas para el servicio oficial de este ramo en las islas Filipinas.

Artículo 13.

El Gobierno y las Autoridades superiores de Aquellas islas ejercán la inspeción de la correspondencia de toda clase, y podran negar el curso de los despachos, ya sean presentados á expedición ó ya recibidos por la línea, siempre que su contenido fuere contrario á la moral ó perjudicial á la seguridad del Estado ó al orden público, pudiendo prohibirse la cifra ó clave, reservada en toda correspondencia de carácter privado.

Artículo 14.

En el caso de que los conductores se inutilicen por causas independientes de la voluntad de la Empresa en el término de duración del contrato, aquélla se obliga à reemplazarlos de modo que de nuevo quede expedita la comunicaciòn en un plazo que

60 expiration of this period, should the repair not be effected, the subsidy shall be suspended until the service has been re-established; and should six months further pass without its being restored, it shall be understood that the subsidy lapses entirely.

Article 15.

Should the service of the Cables be interrupted, totally or partially, for a period exceeding one month, from any cause attributable to the negligence or bad organisation and system of the Enterprise, whether proceeding from defective apparatus or from its technical or administrative department, the Government shall have power to take charge of the Cables and of the service provisionally, and to receive the products of their working; these shall be handed back to the Enterprise at the proper time, after deducting the cost of the official administration, and that of the maintenance and repair, or modification and change of apparatus which may have been necessary. The service shall continue to be carried on by the State as long as the enterprise fails to reorganise the service in a proper manner, it being understood that the concession lapses in the event of the total interruption of the service on the part of the Enterprise exceeding one year.

Article 16.

The Company holding the Concession shall pay the State the ten per cent. which tax in its application to cablegrams is fixed after first deducting the amount of the expenses for the maintenance of the Stations, calculated at £6,000 (six thousand pounds sterling) per annum, the said expenses not to exceed the amount specified.

Article 17.

It shall be obligatory to transmit official despatches, which shall enjoy precedence, at half the rates charged for those of a private character. Official despatches, like private ones, shall be handed to the employés of the State for them to forward or deliver to the addressee.

Article 18.

The tax applicable to telegrams transiting over the said Cables shall be uniform,—fifty centimes of a franc per word,—no transit nor terminal rate being charged for the telegraphic transmission over the land lines belonging to the Govern-

61 no excederà de tres meses. Transcurrido este plazo, y no reparada la averìa, quedarà en suspenso la subvenciòn hasta tanto que se restableciere el servicio, y si transcurrieran seis meses màs sin que se restableciere, se entenderà caducada la subvenciòn.

Artículo 15.

Cuando se interrumpa total ò parcialmente el servicio de los cables por un plazo superior al de un mes, por efecto de cualquiera causa imputable à la negligencia ò mala organizaciòn y règimen de la Empresa, ya proceda de imperfecciòn de los apartos, ya de la parte facultativa ò técnica òde la administrativa, el Gobierno pordà hacerse cargo de los cables y del servicio provisionalmente, y percibir los productos de su explotaciòn. Estos seràn entregados a la Empresa cuando corresponda, deducidos previamente los gastos de la administraciòn oficial, y los de conservaciòn y reparaciòn ò modificaciòn y cambio de aparatof que hubiera sido necesario hacer. Durarà la incautaciòn del servicio por el Estado cuanto tarde la Empresa* [en organizar de nuevo el servicio en las debidas condiciones; entendièndose caducada la concesiòn si la interrupciòn total del servicio por parte de la Empresa] excediese de un año.

Artículo 16.

La Compañia concesionaria abonará al Estado el diez por ciento que por la aplicación de la tasa se fije por los cablegramas, después de deducir el importe de los gastos para el mantenimiento de las estaciones, calculadas en 6,000 libras anuales, no pudiendo exceder dichos gastos de la expresada cantidad.

Artículo 17.

Los despachos oficiales serán de servicio obligatorio y preferente, y á mitad del precio de los de carácter particular.

Tanto los despachos oficiales como los particulares serán entregados á los empleados del Estado para su transmisión ó para su remisión al destinatario.

Artículo 18.

La tasa aplicable á los telegramas que se curson por dichos cables, será uniforme y de cincuenta céntimos de franco por palabra, no cobrándose tasa alguna de tránsito ni terminal por la circulación telegráfica en las lineas terrestres dependientes del

* These words were omitted (apparently through a clerical error, in the copy of the Concession furnished to the Company by the Spanish Government. They appear, however, in the version published in the Gaceta de Madrid of 25th April, 1897.

62 ment in the Islands of Panay, Negros and Zebu. There is a sur-tax of five centimes of a franc per word on telegrams transiting between the above mentioned Islands and the others of the Archipelago.

Article 19.

On the expiration of the twenty years subsidised working of the Cable service granted to the Company holding the Concession, the lines shall continue to be the property of the Company, which may continue the working without any subsidy; but, on the other hand, the State shall be at liberty to carry on the working through other Cables, in the manner it may deem best for the said service, though at its own expense or that of another Company.

Article 20.

The Adjudicatee of the above-mentioned service shall be bound by the decisions of the Authorities and Administrative Tribunals in all questions which may arise between him and the Administration.

Article 21.

The Concessionnaire shall bear the cost of drawing up the Contract Deed and Concession for the construction and laying of the Cables, as well as the expense of a first copy which will have to be handed in at the Office of the Ministry for the Colonies.

Article 22.

The Concessionnaire shall have duly authorised representatives in Manila and Madrid, possessed of sufficient powers to bind themselves on his behalf in their relations with the Government-General of the Philippines, and with the Central Administration at the Ministry for the Colonies.

Madrid 6th April, 1897.

(Signed) TOMÁS CASTELLANO,
Minister for the Colonies.

Accepted on behalf of The Eastern Extension, Australasia and China Telegraph Company—

(Signed) VICENTE COROMINA Y MARCELLAN.

10th April, 1897.

Approved by His Majesty.

(Signed) CASTELLANO.

63 Gobierno en las islas de Panay, Negros y Cebú. Se establece una sobretasa de cinco céntimos de franco por palabra para los cablegramas que se cursen entre las citadas islas y las demás del Archipiélago.

Artículo 19.

Terminado el plazo de los veinte años de explotación subvencionada del servicio de los cables por la Compañía concesionaria, quedarán las líneas de propiedad de la misma, pudiendo después continuarse la explotación por dicha Compañía sin subvención alguna, pero quedando siempre el Estado en libertad de realizar la explotación con otros cables de la manera que mejor considere para dicho servicio, bien por su cuenta ó por la de otra Compañía.

Artículo 20.

El adjudicatario del expresado servicio quedará obligado á las decisiones de las Autoridades y Tribunales administrativos en todas las cuestiones que pueda tener con la Administración.

Artículo 21.

Serán de cuenta del concesionario los gastos de otorgamiento de la escritura del contrato y concesión de la construcción y tendido de los cables, así como los de una primera copia, que habrá de entregarse en el Ministerio de Ultramar.

Artículo 22.

El concesionario tendrá representantes autorizados en Manila y Madrid, con la capacidad suficiente para obligarse en nombre de aquél en sus relaciones con el Gobierno general de Filipinas y con la Administración Central en el Ministerio de Ultramar.

Madrid 6 de Abril de 1897.

El Ministro de Ultramar,

TOMÁS CASTELLANO.

Aceptado en nombre de la Compañía The Eastern Extension, Australasia and China Telegraph—

VICENTE COROMINA.

10 de Abril de 1897.

Aprobado por S. M.

CASTELLANO.

64 Eighthly. This Deed having been substantiaed in the terms specified, and it being therefore the duty of the parties thereto to execute it in due and proper form, in fulfilment of what has been agreed, the appearers accordingly intervene to carry it into effect under the following:

Conditions.

First. The Eastern Extension, Australasia and China Telegraph Company, Limited, domiciled in London, represented in virtue of the Power of Attorney inserted at the commencement (of this Deed) by Don Vicente Coromina, hereby accepts the Concession for the construction, establishment and working of three Submarine Telegraph Cables, which will connect the Islands of Luzon, Panay, Negros and Zebu, in the Archipelago of the Philippines, strictly subject to the Schedule of Conditions accepted and signed by the State and the representative of the Company, and approved by His Majesty in granting the Concession in virtue of the Royal Decree, which is inserted with the said Schedule, and is here reproduced in all its parts.

Second. In guarantee of the fulfilment of the Conditions stipulated, Señor Coromina, acting as the representative of the Eastern Extension, Australasia and China Telegraph Company, Limited, places at the disposal of the Ministry of the Colonies the 100,000 Pesetas which he has paid in hard cash into the Treasury-General of Deposits, in order that it may indemnify itself for any prejudice which may arise to the State in the carrying out of the Contract.

Third. The Most Excellent Minister for the Colonies, as the representative of the State, declared that this Contract shall be duly kept with the Eastern Extension, Australasia and China Telegraph Company, Limited, provided that this latter fulfils all and each one of the Conditions comprised in the same.

Fourth. The Company is subject to the decisions of the Tribunals which the Administration may order or give respecting any act or question which may arise out of this Deed.

Such is the Deed which they execute in due form, and both the contracting parties, as devolves upon them in their representative capacity, respectively bind themselves in legal form to its due fulfilment and strict observance.

65 *Legal Notification.*

I, the undersigned Notary, notify that the first copy of this Deed has to be presented at the Office for the Collection of Dues on Royal Taxes and Transfer of Real Property, so that the needful may be done in paying the Treasury the proper dues within the periods and under the pains and penalties laid down by the Law of imposts for defaulters. In confirmation of all whereof the parties hereto, together with the Attesting Witnesses, Don Martin Pedroche Mayorga and Don José Navarro Sancho, both of this jurisdiction and legally

qualified to act as such witnesses (which they declare after being informed of the reasons constituting qualification), will sign.

I, the undersigned Notary proceed to read aloud this document, the parties hereto having waived the right which the law gives them of reading it themselves.

As regards all that is set forth in the present public document, and of the knowledge and other circumstances stated regarding the parties executing it, I, the undersigned Notary, seal and sign, attest and rubric.

(Signed) TOMÁS CASTELLANO.
(Signed) VICENTE COROMINA.
(Signed) MARTIN PEDROCHE.
(Signed) JOSÉ NAVARRO.
(Signed) ANTONIO TURON.

[SEAL.] (All with Rubric.)

This is the first correct copy of the original Deed No. 141 in my current Register of Public Instruments.

At the instance of the Minister for the Colonies I issue it in a sealed half-sheet of the first class No. 6,678, and in 14th of 13th class, numbers from 724,987 to 725,000 both inclusive, which I sign, seal and rubric in Madrid.

(Here follows note of clerical errors.)

[L. S.] (Signed) ANTONIO TURON.

Having been examined, this Document is returned to the party interested, in order for him to get it exempted from the tax, the Deed which it contains constituting a caution-money in favor of the State (Article 31 of the Regulations).

Don Vicente Corominas y Marcellán has this day paid in fees 75 centimes of a peseta, agreeably to c/p No. 1,423.

Madrid, 20th April, 1897.

[SEAL.] (Signed) B. CERVIGON.
Counsel of the State.

Here there is a Seal on which is inscribed "Liquidación del impuesto de derechos reales, Madrid."

A true copy.

(Signed) G. J. DE OSUNA,
Under-Secretary.

66 II. *Demurrer. Filed May* 13, 1912.

Demurrer.

Now comes the defendant, by its Attorney General, and demurs to claimant's petition for the reasons:

First. It does not set forth facts sufficient to constitute a cause of action against the United States.

Second. It does not disclose a cause of action within the jurisdiction of this Court.

JOHN Q. THOMPSON,
Assistant Attorney General.

W. F. NORRIS,
Attorney.

67 III. *Argument and Submission of Demurrer.*

On the 13th day of May 1912, the demurrer of the defendants came on to be heard.

Mr. W. F. Norris was heard in behalf of the demurrer. Mr. Louis Marshall was heard in opposition thereto and the demurrer was submitted.

68 IV. *Opinion of Court Sustaining the Demurrer and Directing Entry of Judgment Dismissing Petition. Filed Dec. 2, 1912.*

Court of Claims of the United States.

No. 30767.

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,
v.
THE UNITED STATES.

(Decided December 2, 1912.)

PEELLE, *Ch. J.*, delivered the opinion of the court:

The defendants' motion to dismiss the petition in this case was heretofore overruled (46 C. Cls., 646) on the ground that while the United States were not liable under their treaty with Spain for the annual subsidy agreed to be paid by the Government of Spain for the construction of the cables, as set forth in the petition, they were liable on an implied contract to make reasonable compensation for the use of the cables.

Since this ruling the Government has interposed a demurrer to the petition on the ground: "First. It does not set forth facts sufficient to constitute a cause of action against the United States. Second. It does not disclose a cause of action within the jurisdiction of this court."

The contentions of the parties on the demurrer are substantially, if not identically, the same as when the question was up on the motion to dismiss, and therefore we will briefly review what was said in the opinion on the motion to dismiss.

The petition avers substantially that prior to the War with Spain

the claimant herein, a British corporation, had by separate grants and concessions entered into contracts with the Spanish Government for the construction and operation at its own expense of certain submarine cables and telegraph land lines communicating between the Island of Luzon and certain other islands in the Philippine Archipelago and Hongkong, China, for which the Spanish Government agreed to pay the claimant an annual subsidy of £4,500 payable monthly at Manila by the chief treasury office of those islands.

That prior to December, 1898, the Philippine Archipelago, including the islands referred to, was under the control and sovereignty of the Government of Spain, but by Article III of the treaty of Paris of that date (30 Stat. L., 1754), ceding the Philippine Archipelago to the United States, the control and sovereignty of Spain passed to the control and sovereignty of the United States, who thereupon took possession of said islands and, as averred, assumed "jurisdiction and control over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed, and operated by the claimant, and availed itself of all the benefits and advantages thereof, using said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do" without the payment of said annual subsidy of £4,500 so theretofore agreed to be paid by the Spanish Government.

69

By Article VIII of the treaty all buildings, wharves, public highways, forts, and all public property which by law belong to the public domain, and as such to the Crown of Spain, were ceded or relinquished to the United States, for which it is understood $20,000,000 were paid; and it was therein provided that the relinquishment or cession "can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of Provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be."

Upon investigation it will be found that the foregoing is the usual stipulation in treaties and is in effect a declaration of the rights of the inhabitants under international law. (United States v. de la Arredondo, 6 Pet., 691, 712.)

When this case was considered on the motion to dismiss the claimant's contention was (1) that section 1066 of the Revised Statutes—excluding from the court's jurisdiction claims growing out of or dependent on treaty stipulations with foreign nations—was superseded and repealed by section 1 of the act of March 3, 1887 (24 Stat., L., 505); (2) that the claim herein was not one "growing out of or dependent on any treaty stipulation entered into with" the Government of Spain; and (3) that by the law of nations the United States became obligated to perform the contract of its predecessor in said islands.

In the absence of any provision in a treaty to the contrary the

municipal laws of the territory in force at the time of the cession continue until changed by the new Government. (Chicago, etc., R. R. Co. v. McGlinn, 114 U. S., 542.) This, too, notwithstanding the territory so ceded is held subject to the constitution and laws of the new Government. (Pollard v. Hagan, 3 How., 212; Benson v. United States, 146 U. S., 325, 330; Strother v. Lucas, 12 Pet., 410; United States v. Power, 11 How., 570.) Upon the acquisition of territory the private relations and rights of property are not disturbed by a change of allegiance. (United States v. Percheman, 7 Pet., 51, cited in numerous cases, including that of Downes v. Bidwell, 182 U. S., 244, 367. See also Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S., 569.) In other words, the cession of territory does not carry with it the property of the inhabitants thereof. (Strother v. Lucas, supra.) On the other hand upon such cession it has been held that the new Government succeeds to the position of the former Government respecting the property rights of the inhabitants in lands whether executed or executory. (Soulard v. United States, 4 Pet., 511.) It has also been held that by the law of nations the inhabitants, citizens, or subjects of ac-
70 quired or ceded territory retain all their rights of property not taken from them by orders of the conqueror or by the laws of the sovereign acquiring the same. (Mitchell v. United States, 9 Pet., 711.) Nor is title derived by grant to be affected by the political authorities of the new sovereign otherwise than other property of the inhabitants. (Doe Ex Dem. Barbarie v. Eslava, 9 How., 421, cited in Coffee v. Groover, 123 U. S., 10.)

In the case of Cessna v. United States (169 U. S., 165, 186) the court observed: "It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor may have theretofore committed."

This, however, in the absence of a stipulation in the treaty therefor, does not mean that the United States assumed the personal obligations or debts of the Spanish Government to individuals or corporations unless under the rules of international law they thereby became liable. When the United States succeeded to the sovereignty of Spain over the islands they were under no more obligation to continue the contracts for public or private service of individuals or corporations than they were to continue in office officials appointed by the Spanish Government. (Sanchez v. United States, 42 C. Cls., 458; affirmed 216 U. S., 167.)

The cables so constructed under the grants or contracts aforesaid were not public property belonging to the Crown of Spain, and therefore did not pass to the United States by the treaty, but were the private property of the claimant, and so far as the averments of the petition show were so recognized by the United States.

In construing the act of our jurisdiction as it then existed, Revised Statutes, section 1059, the court in the case of Great Western Insurance Co. v. United States (112 U. S., 193), affirming this court (19 C. Cls., 206), held that the jurisdiction of the court did not extend to

claims growing out of or dependent on treaty stipulations with foreign nations, and that as the claim then under consideration was for part of the money received from Great Britain in payment of the award made at Geneva under the treaty of Washington the court had no jurisdiction. To the same effect also is the case of Alling and another v. United States (114 U. S., 562).

Thereafter the jurisdiction of the court was enlarged by section 1 of the act of March 3, 1887 (24 Stat. L., 505); and by section 16 thereof all laws and parts of laws inconsistent therewith were repealed.

Since the passage of the latter act doubt has been suggested both by the Supreme Court and this court whether said act did not repeal section 1066. (United States v. Weld, 127 U. S., 51; affirming this court, 23 C. Cls., 129, and Juragua Iron Co. v. United States, 212 U. S., 297, 310, affirming this court, 42 C. Cls., 99.) But by the recent act "to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, section 1066, as well as the act of March 3, 1887—omitting the repealing section in the latter act—were both reenacted, to take effect January 1, 1912, long subsequent, however, to the treaty of Paris.

That it was the purpose of Congress by the reenactment of section 1066 and the omission of the repealing section in the act of 1887—when the act took effect—to exclude claims growing out of or dependent on treaty stipulations with foreign nations from the
71 jurisdiction of the court, might, perhaps, be considered as removing the doubts theretofore existing; but it is not necessary to now pass upon this question, for as we view it the claim herein is not one growing out of or dependent on any stipulation in the treaty of Paris. As was said by the court in the case of United States v. Weld (127 U. S., 51, 57), "In our view of the case, the statute contemplates a direct and proximate connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims by section 1066, Revised Statutes. In order to make the claim one arising out of the treaty within the meaning of section 1066, Revised Statutes, the right itself, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation."

As there is no stipulation for the assumption by the United States of the claim herein or of the colonial obligations or debts of the Spanish Government upon which the right itself can be based, it can not be held that the claim herein had its origin under or derives its life and existence from any stipulation in the treaty, though protected, if existing, from impairment by Article VIII. So, if any obligation arises to pay the claim it must be outside and therefore independent of the treaty. Force is given to this view by the action of the commissioners negotiating the treaty even as to debts existing against Spain at the time of the cession. On behalf of the Spanish Government the commissioners endeavored to have incorporated in the treaty articles to the effect that the colonial grants and contracts for public works and services in the ceded territory should thereafter

be maintained, and that the United States should assume all the rights and obligations of the Government of Spain. But the commissioners on behalf of the United States rejected the articles so proposed, stating "that they would not accept any articles that required the United States to assume the so-called colonial debts of Spain." They further stated that they disclaimed "any purpose of their Government to disregard the obligations of international law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory." (S. Doc. 62, 55th Cong., 3d sess., pp. 240, 241.) From this it may fairly be said that the claim does not arise out of or depend on the treaty, although but for the treaty no such claim could have arisen.

The claimant also contends that the use of the cables for governmental and other purposes operated as an election ratifying the benefits arising under the contract with the Spanish Government and that therefore the United States should pay not only the reasonable rates for the transmission of messages, but in addition thereto the annual subsidy so agreed to be paid by the Spanish Government. In other words, the contention is that by the use of the cables for governmental and other purposes the Government in effect ratified the contract so entered into by the claimant with the Spanish Government.

It is not averred in the petition that the rates paid by the Government for messages transmitted over the cables for governmental and other purposes were under and pursuant to the terms of the concession to the claimant by the Spanish Government; but
72 if we were to assume that such was the inference from the averments, that would not, in the absence of legislative authority therefor, bind the Government to pay the annual subsidy.

When the United States took possession of the ceded territory they were under no obligation to use the claimant's cables, either in execution of its contract with Spain or otherwise. If it did so, an implied obligation arose to make reasonable compensation for such use. But for this use—the transmission of messages—we now understand compensation has been made, so the only claim is for the annual subsidy under the terms of the concession from or contract with Spain.

The general jurisdiction of this court arises under section 1 of the act of March 3, 1887, supra, giving the court "jurisdiction to hear and determine, so far as material here, the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * *."

In considering the classes of cases involved under that section the Supreme Court, in the case of Dooley v. United States (182 U. S.,

222, 224), said: "The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words 'not sounding in tort' are in terms referable to the fourth class of cases."

It will be observed that the claim herein does not arise under the Constitution or any law of Congress or any regulation of an executive department or upon any contract, express or implied, with the United States.

It is not averred that the Government seized or took physical possession of the cables or that as sovereign over the islands it did other than assume jurisdiction and control over all property and property rights therein, including the submarine cable and telegraph lines of the claimant, using the latter for its governmental and other purposes, for which it made compensation.

There is no averment that the rights of the claimant in and to the ownership and control of its cable and telegraph lines were in any way interrupted or interfered with by the officers of the Government other than for the transmission of messages, for which compensation was made; and if they were, such acts would constitute a tort, over which this court would have no jurisdiction.

Claims for damages, liquidated or unliquidated—not sounding in tort—of which this court would have jurisdiction, usually, if not always, arise out of a breach of some contractual relation with the Government. The breach of an express contract, in the absence of a specific stipulation, gives rise to an action for unliquidated damages; and so an action for unliquidated damages arises out of
73 an implied contract, as where by authority of Congress private property is taken for public use.

If we should distinguish between an implied and a quasi contract, the acts of the parties have not been such as to create the legal relation of obligatio quasi ex contractu.

The obligation of Spain to the claimant was not the obligation of the Philippine Archipelago, though the Spanish Government saw fit to pay the subsidy out of the revenues of the islands; but if we were to assume that it was, the United States, in the absence of treaty stipulation—such as is referred to in Hall's International Law, sec. 28, p. 104—would not be liable therefor. If we were to assume that the obligations of Spain to the claimant was a general debt of the Spanish Government it would be a personal one, as laid down in Hall's International Law, p. 99, note; and being a personal obligation would not, in the absence of a treaty stipulation therefor, attach to the United States.

We reach the conclusion, then, that the claim herein is not embraced in either class under the act of 1887; and therefore if it arises at all it must be under international law.

We have examined with some care the able brief of counsel for the claimant along this line, but we are unable to agree with him that

the authorities cited are controlling, especially on the question of the court's jurisdiction; for if we were to assume that the claim is one arising under international law, the question whether the Court of Claims is the appropriate jurisdiction to determine the matter would still be open. True, the court in the case of The Paquete Habana (175 U. S., 677, 700) said: "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." * * *

The court must first acquire jurisdiction before it can ascertain the rights of the parties under international law and administer thereon. As the former is lacking in the present case, the court is without jurisdiction to determine the question, and therefore the demurrer must be sustained, which is accordingly done, and the petition dismissed.

Howry, J., was not present when this case was tried and took no part in the decision.

74 V. *Judgment Dismissing Petition.*

No. 30767.

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,

vs.

THE UNITED STATES.

At a Court of Claims held in the City of Washington, on the 2d day of December, A. D. 1912, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, sustains the demurrer of the defendants. It is therefore considered and adjudged that the petition of the claimant be and the same is hereby dismissed for reasons stated in the opinion of the Court.

BY THE COURT.

75 VI. *Application of Claimant for, and Allowance of, Appeal to the Supreme Court of the United States.*

From the judgment rendered in the above-entitled cause on the second day of December, 1912, in favor of the defendants, the claimant, by its attorneys, on the 27th day of December, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States.

GUGGENHEIMER, UNTERMEYER & MARSHALL,
LOUIS MARSHALL,

Filed December 31, 1912.

Allowed in vacation, Dec. 31, 1912.

STANTON J. PEELLE,
Chief Justice.

76 No. 30767.

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of pleadings in this cause on demurrer; of the opinion of the Court sustaining the demurrer; of the judgment of the Court dismissing the petition; of the application of the claimant for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at the City of Washington on this 7th day of January, 1913.

Seal Court of Claims. JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 23,494. Court of Claims. Term No. 919. The Eastern Extension, Australasia and China Telegraph Company, Limited, appellant, vs. The United States. Filed January 8, 1913. File No. 23,494.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 419

Office Supreme Court, U
FILED.
MAY 5 1913
JAMES H. McKEN

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,
Appellant,

against

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

PLEASE TAKE NOTICE that on the record in this cause and on the annexed affidavit of Louis Marshall, verified April 29, 1913, a motion will be made before this Court, at the Capitol, in the City of Washington, D. C., on Monday, May 5, 1913, at twelve o'clock noon, or as soon thereafter as counsel can be heard, for an order advancing this cause for an early hearing, on the ground that it involves the jurisdiction of the Court of Claims and an important question of international law, a speedy decision of which is desirable in the public interest.

Dated, New York, April 29, 1913.

LOUIS MARSHALL,
Appellant's Counsel.

TO THE ATTORNEY GENERAL,
Washington, D. C.

4 SUPREME COURT OF THE

UNITED STATES,

OCTOBER TERM, 1912.

No. 919.

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,
Appellant,

5 *against*

THE UNITED STATES,
Appellee.

UNITED STATES OF AMERICA,
Southern District of New York, ss.:
County of New York,

LOUIS MARSHALL, being duly sworn, deposes and says:

6 I am counsel for the appellant herein. The petition herein was filed in the Court of Claims on October 22, 1910. Judgment was therein demanded against the United States for the sum of $109,462.50, that being the aggregate of five instalments of an annual subsidy of £4,500 sterling which was payable to the appellant under the terms of a concession from the Government of Spain, whereby the appellant became empowered to construct, establish and operate three sub-

marine telegraph cables to communicate between the Islands of Luzon, Panay, Negros and Zebu, in the Philippine Archipelago. The said subsidy as contained in the said grant is in the terms following: 7

"Article 9. The Concessionaire undertakes to work, at his own expense and risk, the cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the cables and their adjuncts in perfect working order.

"Article 10. The Concessionaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the cables, the said payments being made at Manila by the Chief Treasury Office of those Islands." 8

Pursuant to this grant the appellant constructed the cable lines, and has ever since maintained and operated them, and has at all times since the granting of the concession been ready, able and willing to perform all of the conditions imposed upon it by the terms thereof, and has actually fulfilled and continued to fulfill all of the said conditions and to perform all of the duties imposed upon it by the terms of the concession.

As a result of the Spanish-American war the sovereignty over the Philippine Islands was 9 transferred to the United States, and it thereupon proceeded to exercise such sovereignty and to assume jurisdiction and control over the several lines of submarine cable and telegraph land lines established, constructed and operated by the appellant, and availed itself of all of the benefits and advantages thereof, using the lines of cable and telegraph for its governmental and other purposes and becoming in all respects the successor of the Government of Spain to all the rights,

10 privileges and advantages conferred upon and secured and reserved by that government under the terms of the concession. Among these privileges was the right of precedence of all official dispatches at half the rates charged for those of a private character. This the United States has, ever since 1898, enjoyed.

After the filing of the appellant's petition the Government moved to dismiss the petition on the ground of lack of jurisdiction of the Court of Claims. After a full hearing the motion was denied, in an opinion which is reported in *46 Court of Claims Reports, 646.*

11 Thereupon the Government filed a demurrer, on the grounds, first, that the petition did not set forth facts sufficient to constitute a cause of action against the United States, and second, that it did not disclose a cause of action within the jurisdiction of the Court of Claims. After full argument the Court sustained the demurrer and dismissed the petition, holding, contrary to its previous determination, that the Court had no jurisdiction under Section 1 of the Act of March 3, 1887, to hear and determine the appellant's claim, and that the United States, in the absence of treaty stipulation, was not liable for the obliga-
12 tions of Spain to the appellant.

An appeal was at once taken to this Court from the judgment dismissing the petition.

The determination of the questions in this cause will require an interpretation of the Act of March 3, 1887, defining the jurisdiction of the Court of Claims; an interpretation of Section 1066 of the United States Revised Statutes, which purports to exclude from the jurisdiction of said Court claims growing out of and depending on treaty

stipulations with foreign nations; a determination, whether that section was superseded and repealed by Section 1 of the Act of March 3, 1887; the further proposition, whether, in any event, the appellant's claim was one growing out of or dependent upon any treaty stipulation entered into with the Government of Spain, and finally whether, by the law of nations, the United States became obligated to perform the contract of Spain in respect to the payment of the subsidy conferred as a consideration for the construction by the appellant of the cable lines hereinbefore referred to, the benefit of which has been enjoyed by the United States. These questions are important and serious, and should be finally determined.

As an additional reason for advancing this cause, I call attention to the fact that, by a recent treaty between the United States and Great Britain, a Commission has been created for the determination of various pecuniary claims made by subjects of the respective governments against the high contracting parties growing out of the Spanish-American war. The proceedings of the Commission will in all likelihood be terminated within a year after the Joint High Commission convenes in May, 1913. It is therefore important to the appellant that, before the proceedings of the said Commission terminate, it shall be determined by this Court, whether or not the Court of Claims has jurisdiction over the appellant's claim, to the end that the appellant may, if the decision is adverse to it, take such steps as might enable it to present its claim to the said Joint High Commission, an opportunity, of which it might be deprived if the hearing of this cause were delayed until such

date when it would be reached in this Court in the usual course.

Wherefore this Honorable Court is respectfully requested to make an order setting this cause for hearing at an early day in the October Term, 1913.

LOUIS MARSHALL.

Subscribed and sworn to before me this 29th day of April, 1913.

EDWARD M. NEARY,
Notary Public,
Kings County,
Certificate filed in New York County.

(Notarial Seal.)

Due, timely and proper service of the foregoing affidavit and notice of motion is hereby admitted, this 30th day of April, 1913.

J. C. MCREYNOLDS,
Attorney General.

Office Supreme Court, U. S.
FILED.
SEP 13 1913
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 419

EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY, Limited,
Appellant,
Against
THE UNITED STATES OF AMERICA.

Appeal from the Court of Claims.

APPELLANT'S ARGUMENT.

LOUIS MARSHALL,
Appellant's Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

SUBJECT INDEX.

STATEMENT:	PAGES.
Nature of the Case	1-2
Petition	3-7
Assignments of Error	7-10
ARGUMENT:	
POINT I. The Court of Claims had ample jurisdiction over this cause under the provisions of the Tucker Act of March 3, 1887	11-17
POINT II. If jurisdiction otherwise exists, there is nothing in Section 1066 U. S. R. S. which affects such jurisdiction	17-51
A. Even though that section had not been expressly repealed when the claim was filed, the Tucker Act, then in force, superseded it, since it dealt with the entire subject of the jurisdiction of the Court of Claims, and embraced new provisions plainly showing that it was intended as a substitute for the former legislation relating to the jurisdiction of that court	17-39

PAGE.

B. But assuming that Section 1066 U. S. R. S., had not been repealed when appellant's claim was filed, the Court of Claims nevertheless had jurisdiction, because the right sought to be enforced did not grow out of, nor was it dependent on, any treaty stipulation entered into with a foreign nation 40-51

POINT III. The facts set forth in the petition constitute a cause of action against the United States.... 51-87

1. On the acquisition by the United States of sovereignty over the Philippine Islands, the Claimant's private rights of property were in no manner affected by the change of sovereignty, and the rights vested in it, both contractual and otherwise, and executory as well as executed, remained enforceable in accordance with the principles of international law 53-59

2. Under the established doctrines of international law, where a part of the territory of one nation is annexed by cession or otherwise to the territory of another, the lat-

PAGE.

ter, by the act of annexation, becomes bound to fulfill all the obligations which pertained to the former in respect of the territory acquired and the property therein. It practically inherits the rights and obligations of the ceding state 59-70

3. Under general principles of jurisprudence the facts set forth in the petition create an obligation on the part of the appellee to the appellant to pay the subsidy provided for in the concession so long as it shall continue to avail itself of the general and special rights and privileges which have accrued to it under the terms of the concession..... 70-81

4. The authorities on which the appellee relied below do not militate against the appellant's contentions..... 81-87

CASES AND AUTHORITIES CITED.

DECISIONS:	PAGE.
Alling v. U. S. (114 U. S. 562)	41
Astor v. Lent (6 Bosw. 612)	76
Atocha, Ex Parte (17 Wall. 439)	40
Baird v. Mayor, &c. of N. Y. (96 N. Y. 589)	79
Baker, Ex Parte (2 H. & N. 219)	30
Barry v. Croydon Gas Co. (15 C. B., N. S. 568)	30
Burnett v. Lynch (5 B. & C. 589)	76
Byers v. McAuley (149 U. S. 608, 628)	17
Cameron v. Nash (41 App. Div. 532)	73
Cessna v. U. S. (169 U. S. 186)	57
Chickasaw Nation v. U. S. (22 Ct. Cl. 222)	26
Cobb v. Hatfield (46 N. Y. 536)	79
Coleman v. U. S. (152 U. S. 99)	80
Delassus v. U. S. (9 Pet. 117)	55
Dent v. Emmeger (14 Wall. 308)	57
District of Columbia v. Hutton (143 U. S. 18, 27)	27, 35
Fennel v. Guffey (155 Pa. St. 38)	75
Fiske v. Henarie (142 U. S. 459, 468)	26, 28
Frank v. N. Y., L. E. & W. R. R. Co (122 N. Y. 197)	73
Greason v. Keteltas (17 N. Y. 491)	77
Great Western Ins. Co. v. U. S. (112 U. S. 193)	40
Greenleaf v. Allen (127 Mass. 248)	75
Grignon v. Astor (2 How. 319, 333)	17
Henderson's Tobacco (11 Wall. 657)	38
Henrietta M. & M. Co. v. Gardner (173 U. S. 123, 218)	38
Hilton v. Guyot (159 U. S. 113, 163)	14, 59
Hollister v. Benedict & Burnham Mfg. Co. (113 U. S. 59)	80

PAGE

Hunt v. Hunt (72 N. Y. 217) 16
Illinois Cent. R. R. Co. v. Adams (180 U. S. 34) 16
Jaragua Iron Co. Ltd. v. U. S. (212 U. S. 297) 25
King v. Cornell (106 U. S. 395, 396) 26, 31
Knote v. U. S. (95 U. S. 149) 15
Leitensdorfer v. Webb (20 How. 176) 56
Masson v. Bovet (1 Denio 69) 79
Mills v. Hoffman (92 N. Y. 181, 190) 79
Mitchell v. Brown (1 El. & Bl. 267) 30
Mitchell v. U. S. (9 Pet. 711) 56
Murdock v. City of Memphis (20 Wall. 590, 617) 26, 37
Mutual Ass. Scy. v. Watts (1 Wheat. 279) 53
Norris v. Crocker (13 How. 429, 438) 38
Pana v. Bowler (107 U. S. 529) 26, 33
Paquette Habana (175 U. S. 677) .. 14, 27, 51, 59
People v. Stephens (71 N. Y. 549) 71, 79
Peralta v. U. S. (3 Wall. 434) 56
Pollard v. Shaffer (1 Dallas 210) 75
Probst v. Rochester Steam Laundry Co. (171 N. Y. 584, 588) 75
Red Rock v. Henry (106 U. S. 596, 601) .. 33
Republica v. De Longchamps (1 Dallas 111) 14
Resolute, The (168 U. S. 437, 439) 17
Rhode Island v. Massachusetts (12 Pet. 667, 718) 17, 71
Salomon v. U. S. (19 Wall. 17) 14
Schoellkopf v. Coatsworth (166 N. Y. 77) 51, 76
Soulard v. U. S. (4 Pet. 511) 57, 58, 85
So. Pac. R. R. Co. v. U. S. (38 Fed. Rep. 55) 15

PAGE

Stewart v. L. I. R. R. Co. (102 N. Y. 607) 73
Strother v. Lucas (12 Pet. 410) 56, 57
Thingvalla Line v. U. S. (2 Ct. Cl. 255) .. 26
Townsend v. Gouley (5 Wall. 326) 57
Tracy v. Tuffly (134 U. S. 206, 223) 26, 34
U. S. v. Arrendondo (6 Pet. 691, 709) ... 17
U. S. v. Auffmordt (122 U. S. 197) 38
U. S. v. Borcherling (185 U. S. 231) 14
U. S. v. Bostwick (94 U. S. 53, 69) 17
U. S. v. Claflin (97 U. S. 546) 26, 30
U. S. v. Clark (8 Pet. 436) 55
U. S. v. Cornell S. S. Co. (202 U. S. 184) 14
U. S. v. Dooling (182 U. S. 229, 234) 14
U. S. v. Great Falls Mfg. Co. (112 U. S. 645) 15
U. S. v. Hewecker (164 U. S. 46) 28
U. S. v. Jones (131 U. S 1) 14
U. S. v. Merono (1 Wall. 400) 56
U. S. v. Morgan (99 Fed. Rep. 570) 14
U. S. v. Palmer (128 U. S. 262) 14, 80
U. S. v. Percheman (7 Pet. 51) 53, 56, 85
U. S. v. Rider (163 U. S. 132) 28
U. S. v. Roselius (15 How. 36) 57
U. S. v. Russell (13 Wall. 623) 14, 80
U. S. v. Smith (94 U. S. 214) 15
U. S. v. True (131 U. S. 21) 14
U. S. v. Tynen (11 Wall. 88, 92) 26, 37
U. S. v. Weld (127 U. S. 51) 14, 24, 41
Vernol v. Vernol (63 N. Y. 45) 79
Wall v. Hinds (2 Gray, 256) 76
Walton v. Stafford (14 App. Div. 312) .. 73
Ware v. Hylton (3 Dallas, 199, 228) 14
Waters v. Collot (2 Dallas, 247) 14
Weld v. U. S. (23 Ct. Cl. 129) 24

TEXT WRITERS: PAGE.

American Journal of International Law, April, 1911, Prof. Hershey..... 62
Benton's International Law and Diplomacy of the Spanish-American War, 270, 275..... 85
Blue Book, South Africa, June, 1901.... 82
"Die Staatensuccession," Max Huber.. 59
"Doctrine of Succession of a State by a State," Cavalieri, Pisa 1910..... 80
Field's Outline of and International Code..... 60
Fiore's International Law Codified..... 61
Fiore's New Treaty of International Law..... 61
Hall on International Law..... 58, 81
Halleck's International Law, (3d Eng. Ed. Vol. 2, 493)..... 58
Law of Private property in War, Norman Bentwich..... 62
Martens on International Law..... 60
Moore's International Law Digest, Vol. 1, 411-414,..... 83
Phillimore on International Law, 3d Ed., 204..... 65
Snow's Leading Cases on International Law, 21, 22..... 55, 67
Westlake on International Law..... 59

STATUTES AND DOCUMENTS:

Letter, Mr. Adams, Secy. of State, to Mr. Everett, Aug. 10, 1818..... 66
Letter, Mr. Bayard, Secy. of State, to Mr. Cowie, June 10, 1885..... 69
Letter, Mr. Bayard, Secy. of State, to Mr. Buck, September 23, 1886..... 70

PAGE

Letter, Mr. Justice Day, President American Peace Commission, to Hon. D. T. Watson, October 4, 1899..... 46, 47
Letter, Mr. Fish, Secy. of State, to Mr. Bassett, February 21, 1887..... 70
Senate Document No. 62, 55th Cong., 3d Session 49, 86, 87
Treaty of Peace, U. S. and Spain..... 45, 46
Tucker Act of March 3, 1887.....11, 12, 23
U. S. R. S., §§ 1059-1069..... 18, 19

Supreme Court of the United States,

OCTOBER TERM 1913.

No. 419.

EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED,
Appellant,

against

THE UNITED STATES OF AMERICA.

Appeal from Court of Claims.

APPELLANT'S ARGUMENT.

Nature of the Case.

The appellant on October 22, 1910, filed its petition in the Court of Claims wherein it demanded judgment against the appellee for the sum of $109,462.50, with interest at the rate of six per cent. on five several instalments of $21,892.50, each, from December 31, 1905, 1906, 1907, 1908 and 1909. These sums represent the equivalent in legal tender of the United States of a subsidy of £4,500 sterling per annum to which the appel-

lant claims to be entitled pursuant to the terms of a concession granted to it by the Government of Spain on April 14, 1897, the obligation so incurred having as appellant asserts been impliedly assumed by the United States of America when it acquired and undertook the exercise of the full right of sovereignty over the Philippine Islands.

Shortly after the filing of the petition the Attorney General, on behalf of the United States, moved the Court to dismiss the petition, for the reason that it did not "disclose a cause of action within the jurisdiction of the Court." After argument the Court, on October 30, 1911, in an opinion by Chief Justice Peelle, reported in *46 Ct. Cl. Rep., 646*, overruled the motion.

Thereupon the Attorney General demurred to the Claimant's petition, alleging as reasons:

"*First.*—It does not set forth facts sufficient to constitute a cause of action against the United States.

"*Second.*—It does not disclose a cause of action within the jurisdiction of this Court." (*Rec. p. 53.*)

On May 13, 1912, the demurrer came on to be heard, and on December 2, 1912, a decision was rendered sustaining the demurrer on the ground of want of jurisdiction. Thereupon the Claimant made application for and gave notice of an appeal to this Court, which was allowed. (*Rec. pp. 60, 61.*)

The Petition.

After setting forth that the Claimant was a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, and as such was authorized to construct, maintain and operate lines of submarine telegraph cables and lines of telegraph in various parts of the world, and particularly in the Far East, Australasia, China and the Philippine Islands, the petition proceeds to state the following additional facts:

(1) On or about February 22, 1879, the Claimant secured from the Government of Spain a grant and concession for the establishment and working of a submarine telegraph cable between the Island of Luzon, one of the Philippine Islands, and Hong Kong in China, whereby Manila, on said Island of Luzon, and the Philippine Islands were to be placed in communication with the universal telegraph system, and pursuant to which the Claimant was given the exclusive privilege for forty years to maintain cable communication between said points.

(2) In conformity with the provisions of said grant and concession, the Claimant laid a cable from Hong Kong to Bolinao, on the Island of Luzon, whence, by means of land lines constructed on the Island, telegraph communication was instituted between Manila and Hong Kong, and thence to other parts of the world, and the Claimant has ever since the laying of this cable, except when prevented by causes beyond its control, actually operated and is still working, the same.

(3) On April 14, 1897, a further concession was granted by the Government of Spain to the Claim-

ant, authorizing the construction, establishment and working of three submarine telegraph cables to communicate between the Islands of Luzon, Panay, Negros and Zebu, in the Philippine archipelago, under the terms of the concession annexed to the petition and made a part thereof. (*Rec. p. 1.*)

(4) Among other conditions the grant contained the following (*Rec. pp. 44 to 50*):

"Article 9. The Concessionaire undertakes to work, at its own expense and risk, the cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the cables and their adjuncts in perfect working order."

"Article 10. The Concessionaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the cables, the said payments being made at Manila by the Chief Treasury Office of those Islands."

"Article 16. The Company holding the Concession shall pay the State ten per cent. which tax in its application to cablegrams is fixed after first deducting the amount of the expenses for the maintenance of the Stations, calculated at £6,000 (six thousand pounds sterling) per annum, the said expenses not to exceed the amount specified."

"Article 17. It shall be obligatory to transmit official despatches, which shall enjoy precedence, at half the rates charged for those of a private character. * * *"

(5) Pursuant to this grant the Claimant constructed, established and placed in working order the cables specified, and opened them for traffic in

October, 1897, and has ever since maintained and operated them.

(6) The Claimant has at all times since the granting of the aforesaid concessions and of each of them, been ready, able and willing to perform all of the conditions imposed upon it by the terms thereof, "*and has actually fulfilled and continues to fulfill all of the said conditions, and to perform all of the duties imposed upon it by the terms of said concessions and each of them.*" (*Rec. p. 2*).

(7) On December 10, 1898, by the Treaty of Paris, sovereignty over the Philippine Islands, including the Islands of Luzon, Panay, Negros and Zebu, was transferred by Spain to the United States, on payment by the latter of $20,000,000; and pursuant to said concession the United States of America acquired title to and absolute jurisdiction over said Philippine Islands, and over the Islands of Luzon, Panay, Negros and Zebu, and the full right of sovereignty over said Islands, and all of the rights and obligations of the Government of Spain with respect thereto ceased.

(8) Thereupon the United States entered into the occupancy of the Philippine Islands, and proceeded to exercise sovereignty over them and jurisdiction and control over all property and property rights in and upon the islands, including the several lines of submarine cable and telegraph land lines established, constructed and operated by the Claimant, "*and availed itself of all of the benefits and advantages thereof, using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do,* and it has in all respects become the successor of

the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to it by the terms of the concessions." (*Rec. p. 3*).

(9) By reason of the premises the United States of America assumed all the obligations and the performance of all of the conditions accepted by the Government of Spain and agreed to by it, according to the terms of its aforesaid concessions and of each of them, and agreed with the Claimant to perform the covenants and agreements and to fulfill the conditions set forth in said several concessions, and accepted and agreed to by the Government of Spain. (*Rec. p. 3*).

(10) The United States of America has failed to perform its agreements by refusing to pay the annual subsidy of £4,500 sterling for each of the years 1905, 1906, 1907, 1908 and 1909.

Although in the first decision rendered by the Court of Claims, it was held that the Court had jurisdiction, in the final decision on the demurrer, it was determined that the Court had no jurisdiction, on the theory that the appellant's claim was not embraced in either of the classes of cases specified in the Act of March 3, 1887, and that it did not arise under International Law, the concluding paragraph of the opinion being as follows (*Rec. p. 60*):

"The court must first acquire jurisdiction before it can ascertain the rights of the parties under international law and administer thereon. As the former is lacking in the present case, the court is without jurisdiction to determine the question, and therefore the demurrer must be sus-

tained, which is accordingly done, and the petition dismissed."

As grounds for reversal, reliance is placed on the following

Assignments of Error.

First.—That the Court of Claims erred in deciding that it is without jurisdiction to determine the claim presented by and set forth in the petition of the claimant filed herein.

Second.—That it erred in deciding that the petition of the claimant herein does not set forth facts sufficient to constitute a cause of action against the United States.

Third.—That it erred in deciding that the petition filed by the claimant herein does not disclose a cause of action within its jurisdiction.

Fourth.—That it erred in dismissing the petition filed herein by the claimant.

Fifth.—That it erred in not deciding that the petition filed by the claimant herein sets forth facts sufficient to constitute a cause of action against the United States.

Sixth.—That it erred in refusing to decide that the petition filed by the claimant herein discloses a cause of action within its jurisdiction.

Seventh.—That it erred in deciding that the claim of the claimant herein does not arise under the Constitution or any law of Congress, or any

regulation of an Executive Department, or upon any contract express or implied with the United States.

Eighth.—That it erred in deciding that the claim filed by the claimant herein is not a claim for damages, liquidated or unliquidated, not sounding in tort.

Ninth.—That it erred in deciding that the acts of the parties set forth in the petition filed by the claimant herein were not such as to create the legal relation of *obligatio quasi ex contractu.*

Tenth.—That it erred in deciding that the obligation of Spain to the claimant was not the obligation of the Philippine Archipelago.

Eleventh.—That it erred in deciding that if it were to assume that the obligation of Spain to the claimant was an obligation of the Philippine Archipelago, the United States, in the absence of treaty stipulation, would not be liable therefor.

Twelfth.—That it erred in deciding that the obligation of Spain to the claimant, being a personal obligation, would not, in the absence of treaty stipulation therefor, attach to the United States.

Thirteenth.—That it erred in deciding that the claim set forth in the petition herein is not embraced in any of the classes contained in any of the provisions of the so-called Tucker Act of March 3, 1887 (24 Statutes at Large, 505), defining the jurisdiction of the Court of Claims.

Fourteenth.—That it erred in deciding that the claimant's claim did not arise under international law, and that assuming that it does, it has no jurisdiction to determine the same.

Fifteenth.—That it erred in deciding that Section 1066 of the United States Revised Statutes was at the time of the filing of the Claimant's petition herein in full force and effect.

Sixteenth.—That it erred in deciding that it is not averred in the petition that the rates paid by the Government for messages transmitted over the cables for governmental and other purposes were under and pursuant to the terms of the concession to the claimant by the Spanish Government; but if the Court were to assume that such was the inference from the averments, that would not, in the absence of legislative authority therefor, bind the Government to pay the annual subsidy.

Seventeenth.—That it erred in refusing to decide that at the time of the filing of the petition herein Section 1066 of the United States Revised Statutes had been impliedly repealed and superseded by the provisions of the Tucker Act of March 3, 1887.

Eighteenth.—That it erred in not deciding that the claim of the petitioner herein was founded upon a contract express or implied with the United States.

Nineteenth.—That it erred in not deciding that the petitioner's claim comes within the language of subdivision First of Section 1 of the Tucker

Act, which gives jurisdiction to the Court of Claims over all claims for damages, liquidated or unliquidated, in cases not sounding in tort and in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable.

Twentieth.—That it erred in failing to decide that under the principles of common law and of international law the United States, having succeeded to the sovereignty of Spain over the Philippine Islands and having obtained the benefit of the cable lines constructed by the claimant under the terms of the grant and concession from the Spanish Government, and availed itself of the benefits and advantages of the claimant's contract, including those created by Articles 16 and 17 of said concession and grant, whereby it received special taxes, paid half rates only on its messages, and secured preferential service, thereby assumed the correlative obligation imposed by said grant and concession, of paying to the claimant the subsidy granted to it by said instrument.

ARGUMENT.

I.

The Court of Claims had ample jurisdiction over this cause under the provisions of the Tucker Act of March 3, 1887.

Section 1 of that act (the portion italicized constituting new matter added to the text of Section 1059 of the United States Revised Statutes hereinafter referred to, and which until then defined the jurisdiction of the Court of Claims) reads as follows:

"SEC. 1. That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon *the Constitution of the United States or* any law of Congress, *except for pensions*, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States,* *or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.*

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or

other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.*"

The language of this act, especially when read in conjunction with Section 1059 of the United States Revised Statutes, indicates that it was the purpose of Congress, to greatly enlarge the jurisdiction previously conferred on the Court of Claims, so as practically to embrace almost every possible claim sounding in contract which might have been entertained in any court, whether at law, in equity, or in admiralty, against a private individual or corporation. It expressly includes within the jurisdiction of that court (1) all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, (2) all claims founded upon any regulation of an executive department, (3) all claims founded upon any contract, expressed or implied, with the Government of the United States, (4) all claims for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable, and (5) all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any claimant against the Government.

The only exceptions or limitations upon the jurisdiction of the Court of Claims are (1) claims

for pensions, (2) cases sounding in tort, (3) war claims, (4) claims theretofore rejected or reported on adversely by any court, department or commission authorized to hear and determine the same, (5) claims not accruing within six years before the institution of suit against the Government.

The United States is thus practically placed on a parity with an individual, so far as its suability is concerned, and the Court of Claims, with the exceptions which have been noted, has plenary jurisdiction to hear such claims.

It is impossible to frame language more comprehensive than that which is to be found in the act, as descriptive of the jurisdiction of the court. "Any" claim maintainable either at law or in equity, or in admiralty, as against a private litigant, upon any contract, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, comes within the orbit of the jurisdiction of that court. The Government practically waives its sovereign privilege of nonsuability, and affords full redress against itself by proceedings in the Court of Claims, without any qualification or limitation other than those expressly specified in the act.

In cases arising between individuals, the phrase "claims * * * entitled to redress * * * either in a court of law, equity or admiralty," would certainly include every conceivable justiciable right, and when, in connection with that phrase, special provision is made for claims founded upon any contract, express or implied, or for damages, liquidated or unliquidated, the entire domain of contract and quasi contract is included, regardless as to whether the claim

grows out of principles of common law, of equity jurisprudence, or of international law.

As was said in *Paquete Habana, 175 U. S. 677*:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdictions, as often as questions of right depending upon it are duly presented for their determination."

See also:

Hilton v. *Guyot*, 159 U. S., 113, 163.
Republica v. *De Longchamps*, 1 Dallas, 111.
Waters v. *Collot*, 2 Dallas, 247.
Ware v. *Hylton*, 3 *Dallas*, 199, 228.

Illustrations of various claims which have been considered under this and similar acts, are afforded by the following adjudications selected at random from among the many that have been made by this Court:

Salomon v. *United States*, 19 Wall. 17.
United States v. *Russell*, 13 Wall. 623.
United States v. *Jones*, 131 U. S. 1.
United States v. *True*, 131 U. S. 21.
United States v. *Dooling*, 182 U. S. 229, 234.
United States v. *Borcherling*, 185 U. S. 231.
United States v. *Weld*, 127 U. S. 51.
United States v. *Cornell S. S. Co.*, 202 U. S. 184.
United States v. *Morgan*, 99 Fed. Rep. 570.
United States v. *Palmer*, 128 U. S. 262.

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645.
United States v. *Smith*, 94 U. S. 214.
United States v. *Bostwick*, 94 U. S. 53, 69.
Knote v. *United States*, 95 U. S. 149.

The legislation relative to the jurisdiction of the Court of Claims being remedial should receive a liberal construction.

Southern Pacific R. R. Co. v. *United States*, 38 Fed. Rep. 55.

The opinion of the Court below, which commingles the argument relating to the existence of a cause of action in favor of the appellant against the appellee with the consideration of the question of jurisdiction, reaches the conclusion that there is no jurisdiction in this case, because of the assumption "that the claim herein does not arise under the Constitution or any law of Congress, or any regulation of an executive department, or upon any contract, express or implied, with the United States," (*Rec. p. 59*), and that the appellant's claim is not one for damages, liquidated or unliquidated.

If this assumption is correct, then of course there is no jurisdiction. We insist, however, that the appellee incurred liability on a contract, express or implied, and that the appellant has a claim for liquidated damages not sounding in tort, and that for that reason jurisdiction exists.

It is evident, therefore, that the real question to be determined in this case, other than the question of the applicability of Section 1066 of the United States Revised Statutes, which bears on the subject of jurisdiction and which will be here-

after considered, is, the fundamental question as to whether or not the appellant has a cause of action against the Government of the United States which grows out of the facts set forth in the petition. If it has, then the Court of Claims had jurisdiction. If it has not, then the claim would necessarily fail. Yet the Court of Claims would have had jurisdiction to determine, whether or not such a cause of action existed in favor of the appellant as would come within those clauses of the Tucker Act on which we base our assertion of jurisdiction.

The jurisdiction of a Court does not depend upon its ultimate decision on the merits, but solely on the question as to whether it has the power to consider the case for the purpose of deciding, either correctly or incorrectly, as to the merits.

Or as was said by Judge Folger in *Hunt* v. *Hunt*, 72 N. Y., 217:

"Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon a state of facts which may appear in a particular case or the ultimate existence of a good cause of action in the plaintiff therein."

Mr. Justice Brown in *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 34, well said:

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence."

See also

Rhode Island v. *Massachusetts*, 12 Pet., 667, 718.
Byers v. *McAuley*, 149 U. S., 608, 628.
United States v. *Arrendondo*, 6 Pet., 691, 709.
Grignon v. *Astor*, 2 How. 319, 333.
The Resolute, 168 U. S., 437, 439.

II.

If jurisdiction otherwise exists, there is nothing in Section 1066 of the United States Revised Statutes which affects such jurisdiction.

A.

Even though that section had not been expressly repealed when the claim was filed, the Tucker Act, then in force, superseded it, since it dealt with the entire subject of the jurisdiction of the Court of Claims, and embraced new provisions plainly showing that it was intended as a substitute for the former legislation relating to the jurisdiction of that court.

Section 1066 was originally enacted on March 3, 1863 (Chapter 92, Sec. 9, 12 Statutes at Large, p. 767). On the codification of the Federal Statutes, it was made a part of Chapter 21, Title XIII of the Revision, that chapter bearing the

caption, "The Court of Claims. Jurisdiction, Powers, and Procedure." The sections composing the chapter are numbered from 1059 to 1093, both inclusive.

Section 1059, relating generally to jurisdiction, provided as follows:

"The court of claims shall have jurisdiction to hear and determine the following matters:

"*First.*—All claims founded upon any law of Congress, or any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either Houses of Congress.

"*Second.*—All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

"*Third.*—The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or payers in his charge, and for which such officer was and is held responsible.

"*Fourth.*—(This provision relates to claims for captured and abandoned property, as to which it was said by this court in 1883, in Hodges *v.* United States, 18 Ct. Cl., 700, that the claim involved in that case was the last claim preferred thereunder and under the acts of 1863 and 1864 therein mentioned).

Section 1060 related to the transmission of private claims by Congress to this court.

Section 1061 related to the method of enforcing judgments for set-offs or counterclaims.

Section 1062 regulated decrees on accounts of paymasters.

Section 1063 made provision for claims referred to this court by Executive Departments.

Section 1064 dealt with procedure in cases transmitted by departments.

Section 1065 referred to the payment of judgments in such cases.

Then followed Section 1066, which is now under consideration, and which reads as follows:

"The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

Section 1067 provided that claims pending in other courts were not to be prosecuted in the Court of Claims.

Section 1068 conferred on aliens the privilege of prosecuting claims against the United States in this court, "whereof such court by reason of their subject matter and character might take jurisdiction."

Section 1069 prescribed a rule of limitation as to the enforcement of claims; and the subsequent sections dealt with matters of practice and procedure in this court.

The Tucker Act of March 3, 1887, made comprehensive changes in the legislation relating to the jurisdiction of the Court of Claims over suits against the United States. It was entitled "An

act to provide for the bringing of suits against the Government of the United States." It evidently sought to deal with the fundamental right to proceed against the Government, and the provisions of the act clearly cover the entire field of the previous legislation, so far as it related to jurisdiction, extending and enlarging that jurisdiction in important respects.

The Act, the first section of which is transcribed on *pp. 11, 12* (*supra*), was not one supplementary or additional to or amendatory of the former laws defining the jurisdiction of the Court of Claims. It was an act which clearly covered the entire field of jurisdiction, re-surveying it and greatly enlarging it. It included in its revision, and in the definition of jurisdiction which it contains, not only the cases included within, but also those excepted from, the jurisdiction of the Court of Claims.

Special attention is called to the following features of the first section of the Tucker Act, as quoted above (*pp. 11, 12*):

(*a*) The asterisk inserted by us in the "First" subdivision denotes the omission therefrom of the words "and all claims which may be referred to it by either House of Congress," which were contained in Section 1059 of the Revised Statutes, the omission of these words being doubtless due to the fact that the Bowman Act, passed March 3, 1883 (*Chapter 116, 22 Statutes at Large 485*), made explicit provision for claims so referred.

(*b*) The proviso in subdivision "First" was practically a re-enactment of the substance of sub-

division "Fourth" of Section 1059 of the United States Revised Statutes. The proviso in subdivision "Second" was substantially a re-enactment of Section 1069 of the United States Revised Statutes, but with some modifications.

(*c*) The additions made to the jurisdictional provisions of Section 1059 are of the most comprehensive character:

(1) They enlarge the jurisdiction of the Court of Claims far beyond the purview of previous legislation with regard thereto. The limited jurisdiction previously existing over claims against the United States is made practically general with respect to claims other than those for pensions, in cases sounding in tort, war claims, claims barred by limitation, and previously rejected claims.

(2) Section 1059 was confined (1) to claims founded upon any law of Congress, (2) those founded on a regulation of an executive department, (3) those founded upon any contract, expressed or implied, with the Government of the United States, and (4) claims referred by either House of Congress, (5) claims of disbursing officers for relief from responsibility, and (6) claims for captured and abandoned property.

(3) The Tucker Act, besides retaining the jurisdiction conferred by Section 1059, confers jurisdiction (1) over all claims founded upon the Constitution of the United States, (2) on all claims for damages, liquidated or unliquidated, in cases not sounding in tort, and (3) in the most sweeping language, over all claims "in respect of which" the claimant "would be entitled to

redress against the United States either in a court of law, equity or admiralty, if the United States were suable."

(4) All limitations upon the jurisdiction of this court, with the exception of those already referred to, (1) claims for pensions and (2) cases sounding in tort (3) war claims, (4) barred claims and (5) previously rejected claims, are obliterated.

Hence Section 1066 of the Revised Statutes is necessarily repugnant to and inconsistent with the provision, which removes all other limitations than those above mentioned and which gives to the Court of Claims that broad jurisdiction, both at law and in equity, which would exist between individuals in that class of cases which come within the jurisdiction created by the Act of 1887.

(5) The limitation laid down in Section 1066 is in no manner referred to in the Tucker Act, and cannot be read into that act without doing violence to the language which confers jurisdiction upon the Court of Claims over claims with respect to which the party making them "would be entitled to redress * * * if the United States were suable." Such redress would doubtless exist against the United States, if it were suable, whether the claim were one "growing out of or dependent on any treaty stipulation entered into with a foreign nation," or not.

As further indicating that, so far as the jurisdiction of the Court of Claims is concerned, the provisions of the Tucker Act superseded those of the Revised Statutes, attention is called to the further provisions of that act, which are entirely new, and which are intended to create a complete

and rounded scheme for bestowing plenary power upon that court, and within certain prescribed limits on the United States Circuit and District Courts, over all manner of claims against the government, save those expressly excepted in the act, some of which had been previously excepted by the provisions of the Revised Statutes.

Section 2 of the Tucker Act confers concurrent jurisdiction with this court on the United States District and Circuit Courts in certain cases. Section 3 confers jurisdiction on the Court of Claims to ascertain the amounts due to the United States by officers and others under obligation to it as principal or surety and enlarges the jurisdiction which existed under subdivision "Third" of Section 1059 of the United States Revised Statutes in that regard. Sections 4, 5, 6 and 7 relate to proceedings in cases before the District and Circuit Courts.

Further sections of the Tucker Act relate to various matters of procedure, to none of which it is necessary to refer, except Sections 12, 13 and 14, which relate to claims transmitted to the Court of Claims under the Bowman Act; and Section 8, which repeals Section 1079 of the Revised Statutes and which makes the provisions of Section 1080 of the Revised Statutes applicable to cases arising under the act.

Section 16, provides that "*all laws and parts of laws inconsistent with this act are hereby repealed.*"

The Tucker Act having thus carefully particularized the causes of action with respect to which jurisdiction was conferred on the Court of Claims in the most comprehensive manner and making specific exceptions and provisos, which did not in

clude "claims growing out of or dependent on any treaty stipulation," there was a manifest inconsistency between that act and Section 1066 of the United States Revised Statutes, and the latter must therefore be deemed to have been superseded by the former.

This point was raised, but was not decided, in *United States* v. *Weld*, *127 U. S. 51*, where this Court held that, even assuming that Section 1066 was in force, the claim there under consideration was not dependent on and did not grow out of any treaty. After having reached that conclusion, Mr. Justice Lamar said:

"The disposition of this question renders it unnecessary to consider whether Section 1066 has been repealed by the subsequent act of Congress, approved March 3, 1887, since, if there has been such repeal, it is admitted on all hands, that the Court of Claims would have jurisdiction of the case."

In this respect this Court took practically the same view as that taken by the Court of Claims in *Weld* v. *United States*, *23 Ct. Cl. 129*, where Chief Justice RICHARDSON said:

"In our opinion this act in court is not excluded from the jurisdiction of the present case by reason of Section 1066 of the Revised Statutes, even if that section be in force and unrepealed. *But it is a serious question whether that section is now in force.* The petition in this case was filed March 4, 1887, and must therefore be governed by the provisions of the Act of March 3, 1887 (Ch. 359, 24 St. L. 505). The first section of the act gives this court jurisdiction in law and equity among other matters, of all claims found-

ed upon any law of Congress or upon any contract with the Government of the United States. It excepts only claims for pensions, war claims, claims which accrued more than six years before suit brought, and claims rejected, etc. by the tribunals authorized to determine the same. It makes no exception of claims growing out of or dependent upon any treaty stipulation, and by section sixteen it repeals all laws or parts of laws inconsistent with that act. Whether or not Section 1066 of the Revised Statutes is repealed by that act, it is not necessary to determine and we express no opinion thereon, as we hold that the section does not in any event apply to the present case."

The question was again raised without being decided, in 1909, in *Jaragua Iron Company, Limited*, v. *United States*, *212 U. S. 297*, where Mr. Justice HARLAN said:

"It may be well to notice one other matter referred to in argument. Section 1066 of the Revised Statutes provided that the jurisdiction of the Court of Claims 'shall not extend to any claim against the Government not pending therein on December 1st, 1862, growing out of or dependent on treaty stipulations entered into with foreign nations or with the Indian tribes.' Act of March 3, 1863, 12 Stat. 767, c. 92, § 9. We need not now consider or definitely determine whether that section was superseded or modified by the above action of March 3, 1887; for, if it was, and if an implied contract could in any case arise from a treaty stipulation, there is nothing in any treaty with Spain which stood in the way of the destruction of the buildings in question under the circumstances stated in the findings without liability on the part of the United States for their value; and if that section was not superseded or modified, then the law is for the United States, because of the absence of any implied contract entitling the

plaintiff, under the facts found, to be compensated for the loss sustained by it."

It has been held by the Court of Claims that Section 1066 does not restrict the jurisdiction conferred by the Bowman Act, which permits that Court to render decisions in an advisory capacity, at the instance of Congress or any of the Executive Departments.

Chickasaw Nation v. United States, 22 Ct. Cl. 222.
Thingvalla Line v. United States, 2 Ct. Cl. 255.

Dealing with this proposition then, as one concededly calling for decision, it is believed that the application of established principles of statutory construction will necessarily lead to the conclusion that Section 1066 of the Revised Statutes was no longer in force at the time of the filing of appellant's claim.

It is now a firmly settled rule that even where two acts are not in express terms repugnant, if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

United States v. Tynen, 11 Wall. 88, 92.
Murdock v. City of Memphis, 20 Wall. 590, 617.
United States v. Claflin, 97 U. S., 546.
King v. Cornell, 106 U. S. 395, 396.
Pana v. Bowler, 107 U. S. 529.
Tracy v. Tuffly, 134 U. S. 206, 223.
Fiske v. Henarie, 142 U. S. 459, 468.

District of Columbia v. Hutton, 143 U. S. 18, 27.
The Paquete Habana, 175 U. S. 677.

The last of these cases is in many respects so similar to the present, that it will be first considered. There, the question arose as to the jurisdiction of the United States Supreme Court over appeals from final sentences and decrees in prize causes, irrespective of the amount in dispute and of the granting of a certificate by a district judge as to the importance of a particular case. It was claimed that Sections 692 and 695 of the United States Revised Statutes, which limited the right to appeal by the amount involved, except in cases where a certificate of the district judge to the effect above stated had been granted, survived the passage of the Act of 1891, defining the jurisdiction of the Supreme Court. This contention was, however, overruled, Mr. Justice Gray saying:

"The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States. The only pecuniary limit is one of $1,000 upon the appeal to this court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the act.

"Section 14 of the act of 1891, after specifically repealing Section 691 of the Revised Statutes and Section 3 of the Act of February 16, 1875, further provides that 'all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.' 26 Stat., 829,

830. The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to. *And, although neither Section 692 nor Section 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the reason of the decision in an analogous case, in which this court said: 'The provisions relating to the subject matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail.' Fisk* v. *Henarie*, 142 U. S., 459, 468."

The opinion, after referring to the authorities, then proceeds to announce the rule of interpretation, which we are now invoking.

The same Act which was under consideration in the case just cited has also been construed as abolishing the right of certification of questions to the Supreme Court, because of division of opinion, in criminal cases, under Sections 651 and 697 of the United States Revised Statutes, though these sections were not specifically enumerated in the repealing clause, and though the effect of such interpretation was to cut off the right of review in criminal cases both at the instance of the Government and of the defendant, until it was expressly reinstated in favor of the Government by the recent Criminal Appeals Act of 1907.

U. S. v. *Rider*, 163 U. S. 132.
U. S. v. *Heinecker*, 164 U. S. 46.

In *Fisk* v. *Henarie*, just cited, the question arose as to whether a provision of the Revised Statutes,

dealing with the removal of causes, had been repealed by an act passed in 1887, with regard to the same subject. Chief Justice Fuller, considering this aspect of the case, said:

"We deem it proper to add that we are of opinion that the act of 1867, or subdivision third of section 639, was repealed by the act of 1887. The subject matter of the former acts is substantially covered by the latter, and the differences are such as to render the intention of Congress in this regard entirely clear. Under the previous acts the right of removal might be exercised by plaintiff as well as defendant; the application was addressed to the state court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; and action on the motion to remand could be reviewed on appeal or writ of error or by mandamus; while under the latter act, the right is confined to the defendant; the application is made to the Circuit Court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the Circuit Court, that is, the Circuit Court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes the defendant will not be able to obtain justice in the State courts; and review on writ of error or appeal, or by mandamus is taken away.

"*The repealing clause in the act of 1887 does not specifically refer to these prior acts, but declares that 'all laws and parts of laws in conflict with the provisions of this act, be, and the same art hereby repealed.' The provisions relating to the subject matter under consideration are, however, so comprehensive, as well as so variant from those of the former acts, that we think the intention to substitute the one for the*

other is necessarily to be inferred and must prevail."

In *United States* v. *Claflin* (*supra*), the question arose, as to whether a section of the Act of Congress passed in 1823, entitled "An Act to amend an act entitled 'An Act further to regulate the entry of merchandise imported into the United States from any adjacent territory'," had been repealed by an act passed in 1866, dealing with the collection of revenue and penalties for a violation of its provisions. Mr. Justice Strong said:

"The real question is, Was the Act of 1866 intended by Congress to be a substitute for the second section of the act of 1823? When it was enacted, Congress had in view as well the offence described in the act of 1823 as other offences against the revenue laws. It mentions *in ipsissimis verbis* the offence created by that act. Its provisions are also broader in their scope. It includes offences by importers. It adds to the offences described in the act of 1823, * * *

"What, then, was its effect upon the prior statute? The principles of legal construction to be applied to such a case are well known. While repeals by implication are not favored, and while it is held that a statute is not repealed by a later one containing no repealing clause, unless the later statute is positively repugnant to the former, or is a plain substitute for it, supplying its provisions, it is still true that repeal or no repeal, substitution or no substitution, is a question of legislative intention, and there are acknowledged rules for ascertaining that intention."

After citing *Mitchell* v. *Brown*, 1 El. & El., 267, *Ex Parte Baker*, 2 H. & N., 219, and *Barry* v. *The Croydon Gas Co.*, 15 C. B., N. S., 568, the opinion then proceeds:

"In *Norris* v. *Crocker* (14 How. 429), it was said by this court: 'As a general rule, it is not open to controversy, that, where a new statute covers the whole subject matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, the former is repealed by implication, as the provisions of both cannot stand together.' That was a case in most points much like the present. The older statute had imposed a penalty for certain offences,—namely, obstructing a claimant in arresting a fugitive from labor, rescuing the fugitive after his arrest, or harboring and concealing him with knowledge that he was a fugitive; and the statute had enacted that the claimant might recover the penalty for his own benefit, and also reserved to him a right of action in damages for the actual injuries he might have sustained. The later statute imposed a greater penalty, and added imprisonment for the offence, gave no right to the claimant to recover the penalty, but gave him a right to recover by way of damages the sum of $1,000 for each fugitive lost by reason of the offences. This court held that the two statutes were in conflict, and consequently that the earlier was repealed."

In *King* v. *Cornell*, (*supra*), the question arose, as to whether subdivision 2 of Section 639 of the United States Revised Statutes was repealed by the Removal Act of 1875, whose repealing clause was practically the same as that occurring in the Removal Act of 1887, above referred to. Under the second sub-division of Section 639 of the Revised Statutes, a defendant who was an alien or a citizen of another State, had the right to remove his cause from the State Court into the Federal Court if the suit, so far as it related to him, was brought for the purpose of restraining or enjoining him, or was one

where there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause. The act of 1875 dealt generally with the subject of removals. Many important new provisions were introduced both as to matters of substance and of procedure. The act did not re-enact the provisions contained in the second subdivision of Section 639 of the Revised Statutes, and the question was presented, as to whether or not that provision was repealed. Chief Justice Waite said:

"The first and second subdivisions of Section 639 were thoroughly revised and radically modified. There cannot be a shadow of doubt that, except as to aliens in the second subdivision, both these subdivisions were repealed and we cannot believe, if Congress had intended to continue in force that part of the second subdivision which allowed an alien defendant to remove a cause, so far as it related to him, and gave his adversary no corresponding right, it would have been left to inference alone. So thorough a revision implies, as we think, an intention to make the new law a substitute for all that those subdivisions contained. The last clause relating to separate controversies needed only the addition of the word 'alien' to make it cover everything in the second subdivision. Had it been added, the law would have been uniform, and allowed removals by both parties in all cases where the right was dependent upon citizenship. With it out, if we hold that the old law is unrepealed, an alien defendant will be allowed to remove his separate controversy as against a citizen, while the citizen will not have the same privilege against him. This, we are satisfied, it was not the intention of Congress to do. It follows that the whole of the second subdivision of Section 639 was repealed by the act

of 1875, and that the cause was not removable on the separate petition of the alien."

See also

Red Rock v. *Henry*, 106 U. S., 596, 601.

In *Pana* v. *Bowler*, (*supra*), the act incorporating the Illinois Southeastern Railway Company declared that, any town, in any county, under township organization, might donate to the company any amount not exceeding $30,000. A subsequent act undertook to revise the charter of the corporation, and the question arose as to whether or not the $30,000 limitation had been repealed. It was decided that the repeal of this limitation had been effected, the reasoning of the court being peculiarly applicable to the present case, Mr. Justice Wood saying:

"Section 10 of the act last named is an entire revision of sections 9 and 10 of the original charter of the company. The original charter authorized townships only to make donations to the railroad company and it required that the railroad, or some part of it or its branches, should be completed before the donation was paid. It did not authorize the issue of bonds to pay the donations, but required the assessment and collection of a tax upon all the taxable property of the town for that purpose. The amendatory act authorized not only townships, but also villages, cities, and counties along the route of the railroad to make donations to the company. It prescribed an entirely different condition precedent to the making of a donation, and required the issue of bonds to pay the donation when made, and it did not require the completion of the railroad, or any part of it, before the bonds were issued. It did not limit the amount which might be donated to $30,000, but

declared that if a majority of the votes cast at the election provided for by the act should be in favor of the donation, the corporate authorities of the village, city, county, or township, as the case might be, should donate to the company the amount so voted at said election, and issue bonds in payment therefor. It thus appears that section 10 of the amendatory act covered the entire subject embraced by sections 9 and 10 of the original act. It related to the same railroad company; it prescribed different methods of procedure in reference to the same subject, and embraced entirely new provisions, thus plainly showing that it was intended as a substitute, *pro tanto*, for the original act. Section 10 of the amendatory act therefore operated as a repeal, by implication, of sections 9 and 10, of the original act, *and removed the restriction limiting to $30,000 the amount which could be donated by a township to the railroad company.*"

In *Tracy* v. *Tuffly* (*supra*), Article 3160 of the Revised Civil Statutes of Texas made provisions with regard to limited partnerships, and declared void as against the creditors of such a partnership assignments made while the partnership was insolvent and with intent to give a preference. By a subsequent act of the legislature the whole subject of assignments by insolvent debtors for the benefit of their creditors was provided for. The material question considered, related to the effect of this subsequent legislation as affecting the validity of an assignment by a limited partnership. Mr. Justice Harlan thus disposed of this subject:

"The object of the act of 1879 was to encourage insolvent debtors to make an assignment of their property for the benefit of creditors. It establishes a complete system for the administration

of estates of insolvent debtors conveyed for the benefit of creditors; and the mere fact that it does not, in terms, modify article 3460 of the Revised Statutes, or the section of the same purport in the act of 1846, will not justify the courts in excepting from its operation the cases of debtors constituting a limited partnership, and including within its provisions debtors, constituting a general partnership. The special object of its third section was to open the way for the discharge of insolvent persons from their debts. Creditors who would not consent to their discharge were left to stand upon their rights, and take the chance of collecting their debts in full, if the debtor got upon his feet and was fortunate enough to acquire other property. The statute is remedial in its character and should be liberally construed so as to give effect to the legislative will. And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, *if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern.* We are of opinion, therefore, that in so far as article 3460 forbids a limited partnership, when it is insolvent or contemplates insolvency, from making an assignment of its property for the benefit only of such creditors as will accept their proportionate share of the effects assigned, and discharge their claims—the share received being sufficient to pay one-third of the debts of the consenting creditors—it is modified by the act of 1879, as amended by that of 1883."

In *District of Columbia* v. *Hutton* (*supra*), it was held that Section 354 of the Revised Statutes of the District of Columbia providing that "no person shall be appointed to office or hold office in the police force (of the District of Columbia), who cannot read and write the English language, or

who is not a citizen of the United States, or who shall ever have been indicted and convicted of crime; and no person shall be appointed as policeman or watchman who has not served in the army or navy of the United States and received an honorable discharge," was repealed by the act of June 11, 1878, "providing a permanent form of government for the District of Columbia." In that case Mr. Justice Lamar said:

"When this qualification provision was first enacted the war had not been long ended, and it was but in harmony with the general liberal policy of the Government of the United States towards those who had fought in its army and navy during that conflict, that a discrimination should be made in their favor, in the matter of appointments to various places of trust in the nation's capital. Their appointment on the police force would serve also to imbue that force with at least some of the precision and attention to duty found in all well regulated military companies that have seen actual service. But in 1878 the war had been over a number of years, and those who had participated in its struggles were growing old and were becoming less able physically to perform all the duties of a member of the police force. * * *

We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. As stated in the language of this court in United States *v.* Tynen, 11 Wall., 88, 92, it is thus: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, and even where two acts are not in express terms repugnant, yet if the

latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In *United States v. Tynen* (*supra*), just referred to, the thirteenth section of the Act of Congress of 1813 "for the regulation of seamen on board the public and private vessels of the United States," which defined certain offences against the naturalization laws, and prescribed their punishment, was held to be repealed by the Act of Congress of 1870, "to amend the naturalization laws, and to punish crimes against the same, and for other porposes," which declared not only that the commission of the several acts mentioned in the law of 1813 should constitute a felony, but that also a great number of other acts of fraudulent character, in connection with the naturalization of aliens, should constitute a criminal offense, and made the infliction of a larger punishment for each offence discretionary with the court.

In *Murdock v. City of Memphis* (*supra*), in which was involved the effect of the provisions of Section 700 of the Revised Statutes, relative to the removal of causes from State Courts, on the prior act of 1867, which amended the Judiciary Act of 1789, it was held that the act of 1789 was repealed by the act of 1867, and that the latter had been superseded by the Revised Statutes, Mr. Justice Miller saying:

"The act of 1867 had no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one by implication. The dif-

ferences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement that there is no repeal by positive new enactments inconsistent in terms with the old law. *It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion.*

"A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, *to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject.* We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it."

See also

Henderson's Tobacco, 11 Wall., 657.
United States v. *Auffmordt*, 122 U. S., 197.
Norris v. *Crocker*, 13 How. 429, 438.
Henrietta Mining & Milling Co. v. *Gardner*, 173 U. S., 123, 128.

While the Court of Claims did not deem it necessary to pass on the question, it was argued below that the re-enactment of Section 1066 by Section 153 of the recent act to "codify, revise and amend the laws relating to the judiciary," approved March 3, 1911, removed any doubts there-

tofore existing. That is not however a sound proposition. This case is to be regarded as governed by the law as it stood when jurisdiction was first invoked, which was more than a year before the Judiciary Code went into effect.

That act could only refer to future cases, since it did not take effect until January 1, 1912 (*Sec. 301*), and expressly provided in *Section 299*, that "the repeal of existing laws or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding * * * pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time and with the same effect, as if said repeal or amendments had not been made."

Far from indicating that Section 1066 was in force at the time of the commencement of this proceeding, its re-enactment by the present act is merely declaratory of the law as it now exists, and cannot be deemed to solve the doubt which was expressed in the decisions above cited, or to counteract the effect of the authorities on which we rely in support of the proposition, that Section 1066 had been repealed by the Tucker Act prior to the filing of appellant's claim.

B.

But assuming that Section 1066 of the United States Revised Statutes, had not been repealed when appellant's claim was filed, the Court of Claims nevertheless had jurisdiction, because the right sought to be enforced did not grow out of, nor was it dependent on, any treaty stipulation entered into with a foreign nation.

The appellee argues that this case comes within the rulings in *Ex Parte Atocha*, 17 Wall., 439, and *Great Western Insurance Co. v. United States, 112 U. S., 193. With this contention we differ.*

The first of these decisions (*Atocha's case*), was rendered in 1873. The claim was referred to the Court of Claims by an act of Congress passed February 14, 1865, which directed that examination be made into the petitioner's claim against the Government of Mexico for losses sustained by him by reason of his expulsion from that country in 1845, and provided that if the Court was of opinion that the claim was a just one against Mexico when the Treaty of 1848 was ratified "*and was embraced by that treaty*" it should fix and determine its amount.

Unquestionably that claim arose out of and was dependent upon the Treaty of 1848 between the United States and Mexico. The decision rendered was necessarily an adjudication that the claim was embraced by that treaty. It had its genesis and foundation therein.

In *Great Western Insurance Co. v. United States, 112 U. S., 193* (decided in 1884), the suit was brought to recover portions of the Geneva Award made pursuant to the Treaty of Washing-

ton. There the petitioner's claim rested on the stipulation of the treaty wherein Great Britain agreed that she would pay the United States if the Board of Arbitration created by the treaty ascertained the existence of liability on the part of Great Britain. Without the treaty the award would have bound nobody. By virtue of it the award became an international obligation whereby Great Britain became bound, as much as a nation can be bound, to pay the amount of the award. The claimant therefore sought to enforce that obligation and in consequene came within the terms of section 1066 of the Revised Statutes.

In *Alling* v. *United States, 114 U. S., 562*, it was likewise held that a claim against the United States for moneys awarded by the mixed commission under the Convention of July 4, 1868, with Mexico, and paid by Mexico to the United States in accordance with the award, is a claim growing out of a treaty, and therefore not within the jurisdiction of the Court of Claims.

All of these cases arose before the passage of the Tucker Act.

In *United States* v. *Weld, 127 U. S., 51*, to which reference has already been made, it was held that a claim against the United States, made under the provisions of the act of June 5, 1882, "re-establishing the Court of Commissioners of Alabama Claims and for the distribution of unappropriated moneys of the Geneva Award," was not a claim growing out of the Treaty of Washington within the meaning of the word "treaty" as employed in Section 1066. Mr. Justice Lamar, after referring to the *Great Western Insurance Company* and *Alling cases*, said:

"We are of opinion, however, that a very broad distinction exists between those cases and this one. In the first case cited, by the allegations of the petition itself, the claim was declared to grow directly out of the treaty, and was thus clearly dependent upon it. The petition based the right of recovery on the provisions of the treaty itself. No statute was invoked, nor was it charged that the United States was directly and primarily liable on the claim. In the language of the court below, which we approve: 'In that case the claimant corporation was not seeking to recover under any law of Congress, but was attempting to enforce an alleged implied assumpsit on the part of the United States, growing out of and dependent upon the Treaty of Washington, notwithstanding the laws of Congress, which expressly excluded its claim from consideration and from payment out of the fund in controversy. Instead of founding its claim on any law of Congress, as do the present claimants, the company invoked the jurisdiction of this court to set aside and annul the statute provisions.'

The Alling case is, in principle, the same as the Great Western Insurance case. In that case the claim on which the suit was based was alleged in the petition to be founded on a treaty stipulation. It had been submitted to the commission authorized and created in accordance with the provisions of the Treaty of July 4, 1868, between the United States and Mexico, for the adjustment of claims of the citizens of the respective countries against the government of the other for injuries to persons and property, and the award of that commission was that the Mexican Government should pay to the United States on account of the claim a specific sum of money out of which the United States might retain a certain amount on account of certain duties originally paid by claimants but subsequently refunded to them by the United States. The claimants having received the sum specifically awarded to them by the commission, and having been refused the sum retained by the United

States, on account of the duties aforesaid, by the Secretary of the Treasury, brought an action in the Court of Claims to recover the amount of said duties. * * * The claim there in controversy was expressly recognized as a specific claim by the commission organized under the provisions of the treaty with Mexico, and was, therefore, dependent upon the treaty, and grew directly out of it.

In this case the reverse is true. The Treaty of Washington did not recognize this claim as a specific claim. The award of $15,000,000, directed to be paid by Great Britain, was to the United States as a nation. The text of the treaty itself speaks of the 'claims on the part of the United States,' and in Article 7 the gross sum was 'to be paid by Great Britain to the United States.' * * * The claimant in this case does not seek to recover upon any supposed obligation created by the Treaty of Washington, but upon the specific appropriation made in the act of June 2, 1886. * * *

It may be said, in opposition to this view of the case, that, had there been no treaty of Washington, there would have been no fund of $15,000,000 to distribute, the act of June 5, 1882, would never have been passed and therefore, that the treaty is the basis of all the subsequent legislation and consequently the basis of this claim; in other words, that, therefore, this claim is 'dependent upon and grows out of' the Treaty of Washington.

"We are of opinion, however, that such a *dependence upon* or *growing out of*, is too remote to come within the meaning of §1066 of the Revised Statutes. In our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims by §1066 of the Revised Statutes. In order to make the claim one arising out of a treaty within the meaning of §1066, the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some

treaty stipulation. This ruling is analogous to that of the ancient and universal rule relating to damages in common law actions; namely, that a wrongdoer shall be held responsible only for the proximate, and not for the remote, consequences of his action."

As indicating that the language of Section 1066 cannot be taken literally, without leading to absurd results, it may be safely conceded that, in one sense, every claim which is presented to the Court of Claims may be said to grow out of or to be dependent on some treaty stipulation. Thus it may be urged, that there would be no government of the United States but for the treaty with Great Britain of September 3, 1783; or that claims relating, directly or indirectly, to lands within the Louisiana Purchase, or in Florida, or in the territory acquired from Mexico or Russia, may involve a consideration of the treaties with France, Spain, Mexico or Russia, by which such lands were ceded to the United States and through which treaties, title to such lands must be traced.

In the present case, while it is true that but for the treaty of cession between the United States and Spain no claim could possibly be made against the United States for the payment of the subsidy which the Spanish Government agreed to pay under the terms of its concession, yet there is no provision in that treaty upon which reliance is placed, or which is sought to be enforced, or upon which our right to recover depends. Just as the Treaty of Washington bore a causal relation to the fund which was the subject matter of *United States* v. *Weld*, the Treaty of Paris is the merest incident to our claim, which does not directly and

proximately depend upon or grow out of that treaty, although it has a remote relation thereto.

The treaty merely serves to confer upon the United States the title to the Philippine Islands. The protocol hereinafter referred to shows that the treaty designedly omitted all reference to the assumption of any contract obligations resting on the Spanish Government, by the United States, but that the existence or non-existence of liability would be dependent upon general principles of international law.

Our claim is based upon those considerations of international law which have been stated with great clearness in the decisions of this Court by approved text-writers and jurists and in various State papers, cited under Point III.

There is nothing in the Treaty of Paris, which terminated the Spanish-American War, that in any way stipulates with respect to the payment of the petitioner's claim. The treaty merely ceded to the United States the Philippine Islands. At the time of the adoption of that treaty there was in force the Concession from the Spanish Government to the claimant, dated April 14, 1897, which is set forth in the petition.

That concession, as has been shown, empowered the appellant to construct, establish and work three submarine telegraph cables to communicate between the Islands of Luzon, Panay, Negros and Zebu, in the Philippine Archipelago, and entitled the appellant to a subsidy.

Article III of the Treaty of Peace between the United States and Spain provides:

"Spain cedes to the United States the archipelago known as the Philippine Islands, and com-

prehending the islands lying within the following line: * * *

"The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty."

Whether the title acquired by the United States be considered as one by conquest or by purchase, the same result follows. The sovereignty of Spain, and its authority over the Philippine Islands, became extinguished when that of the United States sprang into existence. The rights, as well as the obligations of Spain, with respect to this archipelago, ceased when those of the United States began.

In a letter written by Mr. Justice Day, who had served as the President of the American Peace Commission which negotiated the Treaty of Paris, to Hon. D. T. Watson, dated October 4, 1899, he says:

"It was not claimed that the United States had a right to the Philippine Islands as a matter of conquest. The United States has never undertaken, so far as I know, to wrest from a foreign country lands or possessions simply by right of conquest."

He quotes approvingly the remarks of Senator Gray, now a member of the Circuit Court of Appeals of the Third Circuit, one of the Peace Commissioners, made on February 25, 1899:

"Then, after four or five weeks of doubt and anxiety, it became apparent that these negotiations must either be broken off and your Commissioners return without a treaty at all, and that

we would be relegated to the necessity of taking not only the Philippines, but Cuba and Porto Rico, by the ruthless hand of military conquest, or, by some concessions that comported with the magnanimity and greatness and character of this country, gain them, by the voluntary cession of a treaty of peace. And, therefore, we believed that it was better for this country, strong in the hour of its victories, great in the hour of its triumphs, that it should, to a beaten and prostrate foe, exhibit the magnanimity of which I speak, and take from them by voluntary cession and *by purchase*, so to speak, those distant islands, rather than expose ourselves in the eyes of the world as playing a role of barbaric conquest, and by military power tread the path of mediaeval rapine and warfare."

The title of the United States to the Philippines is, therefore, of the same character as its title to the territory secured by the purchase of Louisiana, ceded by France in 1803, of Florida, ceded by Spain, in 1819, of the territory ceded by Mexico in 1848 and 1853, and of the territory of Alaska, ceded by Russia in 1867.

The treaty, by the terms of which the Philippines were ceded, certainly contains no provisions by which the obligations of the United States, assumed in connection with the acquisition of that archipelago, were qualified or limited. It contained no provision with regard either to the assumption or the repudiation of the obligation undertaken by the Spanish Government toward the claimant. On the contrary, the various protocols of the conferences between the Peace Commissioners which were communicated by the President to the Senate on January 4, 1899, and which form a part of Senate Document No. 62, of the Fifty-fifth Congress, Third Session, clearly indi-

cate that it was not the purpose of the American Commissioners to absolve our Government from any of the obligations imposed upon a sovereign nation under the recognized principles of International Law, when it acquires by cession the territory of another sovereign.

At the conference of December 6, 1898, the Spanish Commission proposed two articles, as follows:

"GRANTS AND CONTRACTS FOR PUBLIC WORKS AND SERVICES.

Article .

'All grants and contracts for public works and services in the islands of Cuba, Porto Rico, the Philippines and other ceded territory shall be maintained in force until their expiration, in accordance with the terms thereof, the new Government assuming all the rights and obligations thereby attaching up to the present time to the Spanish Government.

PUBLIC CONTRACTS.

Article .

'Contracts formally entered into by the Spanish Government or its authorities for the public service of the islands of Cuba and Porto Rico, the Philippines and others ceded by this treaty, and which contracts are still unperformed, shall continue in force until their expiration pursuant to the terms thereof. Such contracts as also cover the service peculiar to Spain or any of her other colonies, the new Government of the above-mentioned islands shall not be called upon to carry out, save only in so far as the terms of said contracts

relate to the particular service or treasury of such islands. The new Government will therefore, as regards the said contracts be holden to all the rights and obligations therein attaching to the Spanish Government.

List of pending contracts for Public Works and Services:

Mail and Transportation contract with the Compania Transatlantica.

Contract with English Company ("Cuba Submarine") for the cable on the south of Cuba.

Cable contract, Manila to Hong-Kong, with another English Company (the Eastern).

Railroad Concession from Manila to Dagupan.

All other concessions for railroads now in operation or under construction in Cuba or Porto Rico.

The above are all the contracts at present recalled, although it cannot be stated that there are not others relative to public works and services. None of recent date.

December 1, 1898.' "

The protocol after reciting these proposals, continues:

"The President of the American Commission stated that the American Commissioners were constrained to reject these articles. The United States do not propose to repudiate any contract found upon investigation to be binding under International Law; but no such clauses as now proposed had been inserted in treaties heretofore made by the United States with Spain, France, Mexico and Russia for the acquisition of territory, and it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of International Law."

Senate Document No. 62, pp. 240, 241.

In the final communication by the American Commissioners, in reply to the one submitted by the Spanish Commissioners at the meeting of December 8, 1898, the former say:

"The American Commission felt constrained to reject the articles tendered by the Spanish Commissioners in respect to contracts entered into for public works and services. It took this step because the nature, extent and binding obligation of these contracts are unknown to the American Commissioners and they again disclaim any purpose of their Government to disregard the obligations of International Law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory."

It is thus demonstrated that the very Concession now under consideration was claimed by the Spanish Commissioners to be binding upon this Government upon its succeeding to the Spanish sovereignty over the Philippine Islands, and that the American Commissioners, far from repudiating such obligation, expressly disclaimed, as to the contract obligations of the ceding sovereign, any purpose to disregard such liability as might by international law be imposed upon a successor in sovereignty of ceded territory. They simply refused to enter into a treaty obligation with respect to the subject. Hence the treaty advisedly made no mention of, or reference to, such obligation, and consequently the liability which the appellant is now seeking to enforce is no more dependent on, and no more grows out of, the Treaty of Paris, than did the obligations enforced in *United States* v. *Weld*, (*supra*), grow out of the Treaty of Washington.

The opinions delivered in the Court of Claims in this case, indicate that as to this point, the claimants' contention was sustained.

III.

The facts set forth in the petition constitute a cause of action against the United States.

This proposition is founded on the contention that, under the doctrines of international law, as well as upon common law and equitable principles, all of which are applicable here (*The Paquete Habana*, 175 U. S. 677), under the terms of the Tucker Act, the Claimant has made out a cause of action, since the appellee, by demurring to the question, has admitted the allegations, which make the principles which we shall now invoke applicable.

Schoellkopf v. Coatsworth, 166 N. Y. 77.

These facts, thus conceded, are stated at *pp. 3-6, supra*, and need not now be repeated. In substance, they establish the following propositions:

(*a*) The Government of Spain, for a valuable consideration, granted to the Claimant a concession which afforded to the Philippine Islands universal telegraph communication, upon certain terms and conditions which were to be observed by the Claimant, as well as by the Spanish Government. The Claimant, in conformity with all

of the conditions imposed upon it, created for the Philippine Islands instrumentalities of government and commerce, for such these cables concededly are.

(*b*) These instrumentalities of government and of commerce provided by the Claimant, at its expense, related solely to the Philippine Islands, as a colonial possession, and were for their benefit and advantage, and not for the general purposes and advantages of the Spanish Government, as the parent State.

(*c*) The service which was to be rendered by the Claimant was one which was to continue from year to year, and the subvention which was to be paid to it, was likewise to be an annual payment for services to be rendered from year to year, by the working of the cables and by providing the facilities which they afforded to the sovereign over and to the inhabitants of the Philippine Islands. It was not a payment for past services, but for services to be rendered continously, during the term of the concessions.

(*d*) The appellee succeeded to the sovereignty of Spain over the Philippine Islands, by purchase.

(*e*) Upon succeeding to the sovereignty of the Philippine Islands, the United States, at once exercised control over the cable lines of the Claimant, and availed itself of all of the benefits and advantages thereof, using the facilities and the continuing services, provided by the Claimant, and enjoying the preference and the reduced rates conferred by Article 17 of the concession and other benefits derived from the Claimant.

The appellee has thus come into actual possession and enjoyment, not only of the general benefits and advantages conferred upon the government having sovereignty over the Philippine Islands, in respect of these cable lines, but also of the special benefits as to taxes, precedence, rates and otherwise, reserved to the sovereign. Yet it refuses to pay the consideration, which the Claimant was to receive for conferring such benefits, advantages and privileges.

1. *On the acquisition by the United States of sovereignty over the Philippine Islands, the Claimant's private rights of property were in no manner affected by the change of sovereignty, and the rights vested in it, both contractual and otherwise, and executory as well as executed, remained enforceable in accordance with the principles of international law.*

Although this proposition seems almost axiomatic, it will nevertheless be useful to cite the various decisions of this Court which sustain it, and which, it is believed, are the foundation for the subsequent propositions which are to be presented on behalf of the Claimant.

It is well settled in International Law that a mere change of sovereignty does not produce any change in private rights of property, whether the interest was acquired under a grant from the State, or by individual contract.

> *Mutual Assurance Society* v. *Watts*, 1 *Wheat.*, 279.

In *United States* v. *Percheman*, 7 *Pet.* 51, it was held that, even if Florida had changed its

sovereign by an act containing no stipulation respecting the property of individuals, the rights of property would not be affected by the change of sovereignty.

Chief Justice Marshall said in the course of his opinion in that case (*p. 86*):

"Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington on the 22nd day of February, 1819. The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark that it is very unusual even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereignty by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle: 'His Catholic Majesty cedes to the United

States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi by the name of East and West Florida.' A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belongs to him; lands he had previously granted were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to inttrfere with private property."

This language is adopted in *Snow's Leading Cases on International Law, p. 21.*

In *United States* v. *Clark, 8 Pet., 436*, it was held that the treaty between the United States and Spain, of February 22, 1819, by which the latter ceded to the United States full property and sovereignty over the territory of Florida, did not operate to affect the titles of individuals to portions of the ceded territory, and that under it grants made by Governors generally authorized grant lands were not only *prima facie* valid but binding until disavowed, even if there was power in the Crown to disavow them.

It has been held in numerous cases that a sovereign who acquires inhabited territory acquires full dominion over it, but this dominion does not divest the vested rights of individuals to property.

Delassus v. *United States, 9 Pet., 117.*

Mitchell v. *United States*, 9 Pet., 711.
United States v. *Percheman*, 7 Pet., 51.

By the law of nations, the rights and property of the inhabitants of a conquered country are protected and held sovereign and inviolable, when it is ceded by treaty *with or without any stipulation to such effect*.

Strother v. *Lucas*, 12 Pet., 410.

When New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relations to each other and their rights of property remainded undisturbed.

Leitensdorfer v. *Webb*, 20 How., 176.

The cession of California to the United States did not impair the rights of private property. These rights were consecrated by the law of nations.

United States v. *Mercno*, 1 Wall., 400.

The Treaty of Guadalupe Hidalgo imposed the obligation on this Government to protect titles to lands in California acquired under Mexican rule.

Peralta v. *United States*, 3 Wall., 434.

The treaty between the United States and Mexico did not divest the pueblo existing at the site of the City of San Francisco of any rights of property, or alter the character of the interests it may have held in any lands under the former Government. It makes no distinction, in the protection which it provides, between the property

of individuals and that held by towns under the Mexican Government.

Townsend v. *Greeley, 5 Wall., 326.*

By the law of nations, a change of government does not affect pre-existing titles.

United States v. *Roselius, 15 How., 36.*
Strother v. *Lucas, 12 Pet., 412.*
Dent v. *Emmeger, 14 Wall., 308.*

Titles which were perfect before the cession of Louisiana to the United States continued so afterwards, and were in no wise affected by the change of sovereignty. The treaty so provided, *and such would have been the effect of the principles of the law of nations if the treaty had contained no provision on the subject.*

United States v. *Roselius, 15 How., 36.*
Strother v. *Lucas, 12 Pet., 412.*
Dent v. *Emmeger, 14 Wall., 308.*

In *Cessna* v. *United States, 169 U. S., 186,* Mr. Justice Brewer said:

"It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession."

In *Soulard* v. *United States, 4 Pet., 511,* it was decided that the term "property," as applied to lands, comprehends every species of title, inchoate or complete; it is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed, and that in this respect a new government which re-

ceives territory by cession takes the place of that which has passed away.

Chief Justice Marshall said in support of this proposition:

"In the treaty by which Louisiana was acquired, the United States stipulated, that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle *which would have been held equally sacred*, though it had not been inserted in the contract."

The text writers have recognized the existence of these principles.

2 Halleck's International Law (3d English Ed.) 493.
Hall on International Law, 97.

The authorities above collated unquestionably determine the validity of the grant from the Spanish Government to the Claimant, and the right of the latter to remain in the undisturbed enjoyment of the rights granted, during the term of the grant, exactly as it would, had the grant been one of land or other property or property rights; it being clear, in the language of Chief Justice Marshall in *Soulard v. United States*, 4 Pet., 511, that the rule which we invoke, "comprehends every species of title, inchoate or complete, and embraces rights which lie in contract, executory, as well as executed."

2. Under the established doctrines of international law, where a part of the territory of one nation is annexed by cession or otherwise to the territory of another, the latter, by the act of annexation, becomes bound to fulfil all the obligations which pertained to the former in respect of the territory acquired and the property therein. It practically inherits the rights and obligations of the ceding state.

This proposition must necessarily be largely based on general principles of international law, and upon the customs and usages of civilized nations as indicated in the works of jurists and commentators of recognized authority.

"Where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Hilton v. *Guyot*, 159 U. S., 113, 163, 215.
The Paquete Habana, 175 U. S., 677, 700.

This subject is treated by modern authorities under the general term "State Succession."

The most philosophical work on the subject is that of *Max Huber*, entitled "*Die Staatensuccession*," which has been cited approvingly by *Westlake* in his *International Law*, where, at *page 69*,

he thus translates the author's basic idea from *page 18*:

"The notion of succession, is a general one in law, and belongs exclusively neither to private nor to public law. Succession is a substitution *plus* continuance. The successor steps into the place of the predecessor and continues his rights and obligations; so far as the succession of private and public law agree. But we have to distinguish between those kinds of succession. A civil successor, who steps into the place of his predecessor steps into his rights and obligations, as though he were himself the predecessor. That is the universal succession of private law in the human sense, at least according to the prevailing doctrine. But the successor of international law, steps into the rights and obligations of his predecessor, as though they were his own."

Founded on this theory, the author shows that the succeeding state, is bound by all obligations of the ceding state, which pertain to the territory to which the contract out of which the obligation arises, relates.

This is also recognized by *Martens* in his *Treatise on International Law, pp. 368-369.* He says:

"A state which annexes to itself the territory of another country takes the place of the defunct and succeeds to it completely as a juridical person. It inherits its rights and its obligations."

David Dudley Field, in his *Outline of an International Code*, in which he undertook to codify the law of nations as laid down in the best authorities then accessible, lays down the rule thus:

§23 "Where part of the territory of one nation is annexed by cession or otherwise to the territory of another, the latter nation by the act of annexation acquires all the rights and becomes bound to fulfill all the obligations which pertained to the former nation in respect of the territory acquired, and its inhabitants, and the property therein, but no others."

The Italian courts have had frequent occasion to apply these principles since 1859, with respect to territory formerly belonging to Austria, and other governments, which it annexed during the process of unification. The rule laid down by them is as follows:

"By virtue of public law a state is bound, independently of special conventions, by all obligations legally contracted by its predecessor in regard to territory to which it succeeds."

The Italian doctrine was adopted and applied by the *Counseil d'Etat* of France, by a decree of April 28, 1876.

In *Volume 1 of Fiore's New Treaty of International Law*, the author says (*§356, p. 313*):

"The annexing government succeeds to the rights and obligations resulting from contracts regularly stipulated by the ceding government in relation to the public interest of the territory ceded."

In *Fiore's International Law Codified*, recently published, the author says with regard to this subject:

§152. "As to everything that is not regulated by an express provision, it must be deemed that the

cessionaire state, assumes the condition of successor by universal title, of that which relates to both active and passive qualities, which can be deemed annexed to the exercise of the public power or which result from past contracts of the government of the ceding state, for the purposes of a public utility, relating to the ceded territory."

An interesting article by Professor Hershey of Indiana University, appeared in *American Journal of International Law for April, 1911*, entitled "The Succession of States," where on *pp. 294, 295*, he says:

"There is a difference of opinion respecting the obligations of the new or annexing state to execute the contracts, concessions or franchises, etc., granted by the ceding or dismembered state within the ceded territory or territorial borders of the colony or province which has achieved its independence. It would certainly seem that such contracts and concessions should, as a rule, be respected, and this has been the general practice of nations for at least a century; but international practice is by no means uniform, and the rule is not without important exceptions.

The general principle governing this important but much neglected subject has been correctly stated by a leading Italian authority 'The annexing government succeeds to the rights and obligations resulting from contracts regularly stipulated by the ceding government in the relative public interest of the territory ceded.' "

Mr. Norman Bentwich, an English writer of note, in his recent monograph on the *Law of Private Property in War, pp. 70-72*, says:

"The state acquiring territory is bound generally to take over the contractual obligations of the

previous sovereign to individuals of corporations. But its right to disclaim contracts made directly for the purposes of war, which is stated by the Transvaal Commissioners, seems to be an equitable exception to the rule. * * * The Transvaal Commissioners laid down a better opinion when they say, following the American case United States *v.* Soulard, that 'after annexation the rights of property remain undisturbed, and include those arose out of the cession of Louisiana to the United States, Marshall, C. J., declared that 'property is supposed to embrace rights which lie in contract —those which are executory as well as those which are executed.' The Italian Government after the acquisition of Venetia and Lombardy by the Treaties of Zurich and Lombardy, in which it undertook to satisfy all the local obligations of the provinces, gave the widest possible interpretation to its contractual obligations as the successor of the Austrian Government. It offered to consider the compensation for requisitions regularly made by the Austrians as a charge upon the State; and the Court of Cessation at Florence, in March, 1877, held that by public law the state which succeeds to part of the territory of another is bound, independently of special convention, by obligations legally contracted by the latter in relation to the territory. In May, 1896, the same court upheld its previous principle in an action brought against the Ministry of Finance by a contractor for the price agreed upon with the Austrian Government for the execution of certain fortifications round Venice. The practice of Italy shows a most thoroughgoing acceptance of the judicial rule without any saving provisions based on expediency. It is very generous, but it is probably a little ahead of common international usage.

The practice of England, on the contrary, shows a neglect of the juridical rule, combined with a half-recognition of its authority, and is probably a little behind international usage. In the terms of peace between England and the Boers she covenanted to devote £3,000,000 to cover war losses,

which included losses by requisition and seizure of property by the enemy State; or, in other words, contracts made by the conquered Government. But Mr. Chamberlain declared, in the House of Commons, that this was 'an act of grace without admitting any liability.' Finally, there has come the declaration of the Divisional Court that 'there is no principle of international law by which, after conquest, the conqueror becomes liable, in the absence of express stipulation to the contrary, to discharge the financial liabilities of the conquered State incurred before the outbreak of the war * * * ' the exact converse of the Italian Court's statement. It should be said, however, that the opinion of the English judges is much harsher than the practice of the English Government, which, as has been noted, has acted with peculiar generosity.

The true position of international usage at the present day would appear to be somewhere between the English and the Italian decisions. The guiding principle is that the conqueror who succeeds to the assets of the conquered state succeeds also to its liabilities, especially when they are directly connected with the assets. The maxim 'Res transit cum suo onere' applies to state as well as to private acquisitions. But this principle should be qualified by the following exceptions: 'The successor is not responsible for liabilities arising from (1) the torts of its predecessor; (2) contracts for war and the cost of war.' "

Hall's International Law, 5th ed. p. 99.
Wheaton's International Law, 4th ed. p. 46.
Halleck's International Law (Baker's 1878 ed.), Vol. II., p. 504.
Calvo's Droit International, 4th ed. Vol. I., p. 428; Vol. IV., p. 404.
Heffter's Droit International de l'Europe, 4th ed. pp. 63-64.
Huber's Die Staatensuccession, s. 217.

In *1 Phillimore on International Law (3d Ed.)*, p. 204, after quoting the views of Savigny Hooker, Abbé Mably, D'Aguesseau and Montesquieu, it is said:

"Applying this principle to international relations we learn that as one generation does not constitute a State, it is not merely by the obligations created by one generation that the *present* State is bound; the engagements of the *past*, whether arising from implied contract of long usage, or the express letter of treaty, or the pledge of the Executive Government howsoever plighted, are as stringent upon her as those of the present. The individual succeeds to rights and obligations which he had no share in obtaining or directing; and still more is this condition predicable of every corporate body. Nor is the greatest of all corporations, the State, exempt from the operation of a rule which is laid in the eternal constitution of things."

At page 210 the author says:

"We have, then, this opinion of the continuity of the rights and obligations of a State confirmed by the unanimous authority of the most celebrated jurists and statesmen of all countries. This accumulation of authorities must not be regarded as an idle parade of evidence, because, all has been already observed, a proposition which is maintained by the concurrent voice of eminent jurists of various civilized countries becomes *ipso facto*, as it were, a part of International Law."

At page 211 he says:

"It remains only to add a proposition which is, indeed, a corollary from the foregoing statements. If a nation be divided into various distinct societies, the obligations which had accrued

to the whole before the division are, unless they have been the subject of special agreement, ratably binding upon the different parts. * * *"

The author cites the view of Dr. Heffter, a prominent German writer on International Law, who says:

"Moreover, that the acts of sovereignty of a former ruler, which are in conformity with the Constitution of the governed territory, are likewise binding upon the successor to the sovereignty, can certainly not, according to International Law, be the subject of doubt."

Our Department of State, has from time to time, had occasion to express its views concerning cases of a cognate character to that now presented, when called upon to intervene with other governments in behalf of our own citizens.

The following citations from Wharton's Digest seem peculiarly applicable here:

"No principle of international law can be more clearly established than this, that the rights and the obligations of a nation in regard to other states are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty. However frequent the departure from this principle may be in point of fact, it cannot with any color of reason, be contested on the ground of right."

Mr. Adams, Secretary of State, to Mr. Everett, August 10, 1818.

In 1866, a question arose as to the rights of our citizens under a grant made by the predecessor of the then Government of Chili. In his instructions to Mr. Roberts, Mr. Bayard, then Secretary of State, used the following language, which has been incorporated in *Snow's Leading Cases on International Law, p. 22*:

"But the decision now made rests on an alleged rule of international law which, assumed, as it now is, by the Government of Chili, becomes a proper matter of discussion between ourselves and that Government. It is asserted by the Government of Chili (for, in international relations, and the maintenance of international duties the action of the judiciary in Chili is to be treated, when assumed by the Government, as the act of the Government) that a sovereign, when occupying a conquered territory, has, by international law, the right to test titles acquired under his predecessor by applying to them his own municipal law, and not the municipal law under which they vested.

The true principle, however, is expressel in the following passage cited in the memorialist's brief:

'But the right of conquest cannot affect the property of private persons; a war being only a relation of State to State, it follows that one of the belligerants who makes conquests in the territory of the other cannot acquire more rights than the one for whom he is substituted; and that thus, as the invaded or conquered State did not possess any right over conquered property, so also the invader or conquerer cannot legitimately exercise any right over that property. Such is today the public law of Europe, whose nations have corrected the barbarism of ancient practices which place private as well as public property under the mili-

tary law.' (*C. Massé, Rapports du droit des gens avec le droit civil, Vol. 1, pp. 123, 148, 149.*)

This doctrine has been frequently acted on in the United States.

Thus it has been held by the Supreme Court that when New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other and their rights of property remained undisturbed (Leitensdorfer *v.* Webb, 20 How., 176).

The same has been held as to California. The right acquired under the prior Mexican and Spanish law, so it was decided, were 'consecrated by the law of Nations' (U. S. *v.* Moreno, 1 Wall., 400; U. S. *v.* Auguisola, 1 Id., 352; Townsend *v.* Greeley, 5 Id., 326; Dent *v.* Emmeger, 14 Id., 308; Airhart *v.* Massion, 98 U. S., 491; Mutual Ass. Soc. *v.* Watts, 1 Wheat, 279; Delassue *v.* U. S., 9 Pet., 117; Mitchell *v.* U. S., 9 Pet., 711; U. S. *v.* Repentigny, 5 Wall, 211).

The Government of the United States, therefore, holds that titles derived from a duly constituted prior foreign government to which it has succeeded, are 'consecrated by the law of nations,' even as against titles claimed under its own subsequent laws. The rights of a resident neutral having become fixed and vested by the law of the country cannot be denied or injuriously affected by a change in the sovereignity, but the rights at the time of the change must be measured and determined by the laws under which he acquired them. * * * The Government of the United States is therefore prepared to insist on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign Governments succeeding that by which they (were) granted. Title to land and landed improvements is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political

offenses, or to withdraw franchises which by the law of nations can be withdrawn by Governments for the time being. Such prerogatives have been conceded by the United States, as well as by other members of the family of nations by which international laws is constituted. What, however, is here denied is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they would not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historic municipal continuity of governments which is at the basis of international law."

"Chili, in taking possession at the close of the late war with Peru of the guano deposits belonging to Peru, took them subject to such liens as were binding under Peruvian law at the time of the cession."

Mr. Bayard, Secretary of State, to Mr. Cowie, June 10, 1885.

"Upon the general question of the binding effect upon Peru of contracts made by the Pierola and Iglesias governments, in accordance with the constitution and laws of that country, the opinion of this Department is that the performance of such engagements is obligatory upon the present Peruvian Government, and that the attempt on the part of that Government to avoid such contracts, thus denying the capacity of the Pierola and Iglesias governments to contract, in violation or disregard of the vested rights of citizens of the United States, would afford just ground for complaint. For the greater part of six years, from 1879 until 1885, either the Pierola or Iglesias government was recognized by foreign powers as the Government of Peru. The United States, in common with other nations, maintaining diplomatic and commercial relations with that country, took no part in the civil conflict which raged from time to time during that period, but acted upon

the principle of recognizing as the lawful government of Peru, that political organization which was able to maintain the diplomatic and commercial relations of the country with foreign nations, the acts of such a government being universally admitted as binding upon the country which it represents.

This principle holds, even where a change in the form of government occurs, and it applies still more strongly where the change is merely in the personnel of the government. Contracts made by a government are to be regarded as the obligation of the nation it represents, and not as the personal engagements of the rulers. Hence, although the government may change, the people remain bound."

Mr. Bayard, Secretary of State, to Mr. Buck, September 23, 1886.

"A successful revolution does not relieve the country revolutionized from liability on its prior engagements to foreign states."

Mr. Fish, Secretary of State, to Mr. Bassett, February 21, 1887.

3. *Under general principles of jurisprudence the facts set forth in the petition create an obligation on the part of the appellee to the appellant to pay the subsidy provided for in the concession so long as it shall continue to avail itself of the general and special rights and privileges which have accrued to it under the terms of the concession.*

That the appellee has derived and continues to derive benefits and advantages from the cables constructed by the Claimant under its concession, that it has received and is receiving the special tax of 10% provided for in Article 16, and the

precedence and half rates specified in Article 17 of the Concession, is admitted. That the existence of the cable itself has not only been of inestimable benefit to our Government, but, when it first came into possession of the Philippine Islands, was practically indispensable to enable it to conduct the affairs of the newly acquired territory, is a matter of history.

Viewed in the light of these facts, this case must be treated precisely as it would be if the questions now presented had arisen as between private individuals.

As was said by Judge Allen in *People* v. *Stephens*, 71 N. Y., 549:

"The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor."

See also *Rhode Island* v. *Massachusetts*, 12 Pet. 737, 738.

Regarding the case therefore, exactly as it would be, if it arose between two private citizens, instead of between a claimant and a sovereign,

we may be aided in the consideration of it by drawing a parallel between the facts here presented and those which are of frequent occurrence in everyday business experience.

(*a*) Let us assume that A, the owner of a building, leases it to B for a term of twenty years, at a stipulated rental of $10,000 per annum, giving to B not only the right of occupancy of the demised premises, but providing him with light and heat at less than the prevailing price, as a special inducement. After having entered on the demised premises, B assigns his lease to C, without special covenants of any kind. C thereupon enters into possession of the demised premises, and avails himself of the light and heat supplied at reduced rates. Can C avoid liability for the stipulated rent, for the term of his occupancy?

(*b*) Or let us suppose that A, the owner of land, enters into an agreement with B, whereby the latter is to erect upon the land a building, of which he is to be the lessee for a specified term. In the contract it is, however, stipulated that A is to have an easement in the building, for a period of twenty years, in consideration of which he covenants to pay B annually the sum of $10,000. A thereupon conveys the property and easement to C, who enters into possession and enjoyment of the easement. Can the latter, under these circumstances, avoid liability for the amount to be paid annually, pursuant to the covenant, so long as he remains in occupancy?

We believe that both of these questions are to be answered in the negative; and inasmuch as the answer seems decisive of this case, a reference to

the authorities which are applicable will prove useful.

It has been decided by a multitude of authorities that where a lessee assigns his estate in demised premises, the assignee is liable to the lessor, for the rent reserved in the lease, the assignee becoming liable by reason of privity of estate, even though there be no privity of contract.

In *Stewart* v. *Long Island Railroad Co., 102 N. Y., 607*, Judge Rapallo, one of the most distinguished jurists of his time, said:

"Where a lessee assigns his whole estate without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee, on the covenant to pay rent, or any other covenant in the lease, which runs with the land."

Where, therefore, an assignee utilizes the demised premises, privity of estate is established, and as a sequence the assignee, so long as he remains in possession, becomes liable, not for use and occupation or upon a *quantum meruit*, but upon the covenants of the lease.

Walton v. *Stafford, 14 App. Div. 312.*
Cameron v. *Nash, 41 App. Div. 532.*

In *Frank* v. *N. Y., L. E. & W. R. R. Co., 122 N. Y. 197*, the Erie & Genesee Valley Railroad Company leased its road to Woodruff for the unexpired term of its charter. The lessee agreed to pay as rental, interest on certain mortgage bonds previously issued by the lessor, and to

pay the mortgage debt at maturity. Woodruff executed a lease of the same property to the Erie Railway Company. The lessee took possession and thereafter operated the road as part of its system. It executed a mortgage on all of its property, including its leasehold interest. The Erie Railway Company subsequently becoming insolvent, action was brought for its dissolution, a receiver being appointed, who took possession of its property, including that covered by the lease. The mortgage was foreclosed and the property sold to purchasing trustees, who conveyed it to the New York, Lake Erie & Western Railroad Company. The leasehold was not, however, included in the property sold, or even in the notice of sale. The receiver, from the time of his appointment, operated the leased road. After the transfer, under the decree of foreclosure, the new company operated it.

In an action to foreclose the mortgage given to secure the bonds issued by the Erie & Genesee Valley Railroad Company, it was held, that when the receiver took possession and operated the leased road, he became liable in effect as assignee of the lease, during the period of his occupation; that even though the lease was not sold at the foreclosure sale, the new company, having taken possession of the property covered by the lease and having operated the leased road, became *prima facie* liable, as assignee of the lease, to pay the rent therein stipulated during the term of its occupancy. In the course of his opinion Judge Vann said:

"The appellate company, right after its organization, entered into possession of the property

covered by the lease, and it has remained in possession and has operated the railroad ever since, yet it failed to show upon the trial in what capacity it entered or by what authority it operated the road. * * * It cannot be heard to say that it entered as trespasser, for that would be asserting its own wrongful act as a defense to the claim of one who had the right to waive the tortious element, if it existed, and to insist upon the entry as valid with all the consequences that may be implied therefrom. * * * What presumption arises from the fact of possession and occupation under these circumstances? Where a person other than the lessee is shown to be in possession of leasehold premises, the law assumes that the lease has been assigned to him. * * * It does not, however, presume that the assignee entered into any express covenant to pay rent, or otherwise than through privity of estate. The appellant company, therefore, under the facts proved, became *prima facie* liable as assignee of the lease during the period that it operated the road. This involved the obligation to perform all covenants running with the land that were broken during said period, including the covenant to pay rent, or that which stood in the place of rent. * * * The appellant company, therefore, is to be regarded as assignee of the lease during the time that it has occupied the leasehold estate, and as such liable for the rent accruing subsequent to the date of entry, at least until the new arrangement was made, which is alleged to have relieved it from further liability to pay rent as stipulated in the lease."

To the same effect are

Pollard v. *Shaffer*, 1 Dallas, 210.
Probst v. *Rochester Steam Laundry Co.*, 171 N. Y. 584, 588.
Greenleaf v. *Allen*, 127 Mass. 248.
Fennel v. *Guffey*, 155 Pa. St. 38.

Wall v. *Hinds, 2 Gray, 256.*
Burnett v. *Lynch, 5 B. & C. 589.*
Astor v. *Lent, 6 Bosw. 612.*

Not only is this principle applicable in favor of a lessor, as against an assignee of a leasehold interest, but it also applies in favor of a lessee, as against an assignee of the reversion.

Thus in *Schoellkopf* v. *Coatsworth, 55 App. Div., 331, aff'd. 166 N. Y. 77*, it appeared that a lease for a term of fifteen years, required the lessee to erect certain specified buildings on the demised premises, within a definite period, and the lessors were to pay to the lessee "at the expiration of the term above created" the full value of such buildings, unless notice of the lessors' intention to take possession of the demised premises were given, at least six months before the expiration of the term. The lease provided that in the event of a failure to give such notice, the lease should be continued for the term of five years from the expiration of the original term, on the same terms and conditions "hereinbefore expressed," except as to the amount of rent to be paid. The lessors subsequently assigned their reversion, and neither they, nor their assignee availed themselves of the right to terminate the lease, at the end of the original term. It was held that the obligation to pay for the buildings upon the demised premises was not discharged, and that upon the termination of the lease by the assignee of the reversion, he was liable under the covenant therein contained, which required the lessors to pay the value of the buildings. The Court said:

"It must be assumed, we think, that the parties to this action stand in precisely the same relation

towards each other as did the original parties to the lease; that is, the plaintiffs, as assignees of the lease, have succeeded to whatever right, title or interest that instrument conferred upon such lessee, which the defendants, having come into possession of the demised premises without having parted with any consideration therefor, with notice of the lease, and having thereafter received the benefits accruing under the lease, are chargeable with the lessors covenants as their successors in title. (*Greason* v. *Keteltas*, 17 N. Y. 491.)

In the latter case, the circumstances of which were similar, Judge Selden said:

"By the lease in question the parties mutually covenanted that, at the expiration of the term, the value of the buildings should be ascertained by two sworn appraisers, one of whom should be chosen 'by each of the said parties.' There is no doubt that this was a personal covenant, and binding as such upon the trustees; and as the defendant, Keteltas, had succeeded by substitution and survivorship to all the rights of the original trustees, this covenant, which attaches itself to the estate, is obligatory upon him so long as he retains the title to the premises."

Applying these principles to the present case we find, that the United States succeeded Spain in sovereignty over and ownership of the Philippine Islands. Its rights, though based on conquest, were confirmed by purchase in the form of a cession. The United States thereby became substituted to the Spanish sovereignty, and succeeded to all of its rights under the concession from the Spanish Government to the Claimant.

We will assume, for the present, that it was under no obligation to avail itself of any of the rights or privileges conferred, by the terms of the

contract between Spain and the Claimant, and that it might have declined to make use of the benefits and advantages accruing under such contract. Instead of pursuing that course, however, the United States, immediately on taking possession of the Philippine Islands, assumed control over the cable lines constructed and operated by the claimant, "availed itself of all of the benefits and privileges thereof," and used, and has ever since continued to use, the cable lines for its governmental and other purposes, under the terms of the concession, all the conditions of which have been actually fulfilled and performed by the Claimant.

Hence, even though it might be argued, that there was no privity of contract, between the United States and the Claimant, there has arisen a privity of estate, which, so long as that privity continues, obligates the former, to perform the covenant contained in the contract between Spain and the Claimant.

Independently of the obligation which springs from the principle thus far considered, growing out of the analogy suggested by the doctrine deduced from the law of landlord and tenant, the same result would follow under the principles of *quasi* contract, resulting from the circumstance that the United States has, ever since it succeeded to the Spanish sovereignty, availed itself of the benefits and advantages of the Claimant's contract and has enjoyed the special advantages of Articles 16 and 17, whereby it has received special taxes, has paid half rates, and has secured preferential service.

As between individuals, such a state of facts would result in the implication of a contract, by recipient of these benefits, to be bound by the

terms of the agreement, whence such advantages are derived. The acceptance of benefits so secured involves the obligation of assuming the correlative burdens imposed by the same contract.

The government, no more than an individual, will be permitted to blow hot and cold; to adopt and renounce at one and the same time; to affirm that part of an arrangement which is advantageous, and to disaffirm that portion which is onerous. When it sees fit to accept benefits, it must be deemed to have elected to take them *cum onere*.

It has been held that even where a State has been induced to enter into a contract by fraud, if it nevertheless, with knowledge of the fraud, continues to take the benefits of the contract, it is not thereafter permitted to repudiate it, but is bound to perform its provisions; thus placing it in this regard, on a parity with private individuals.

People v. *Stephens*, 71 N. Y., 527.
Masson v. *Bovet*, 1 Denio, 69.
Vernol v. *Vernol*, 63 N. Y., 45.
Mills v. *Hoffman*, 92 N. Y., 181, 190.
Baird v. *Mayor, &c. of N. Y.*, 96 N. Y., 589.

In *Cobb* v. *Hatfield*, 46 N. Y., 536, Judge Allen thus expressed the doctrine:

"The taking of a benefit is an election to ratify it and concludes him. He cannot be allowed to deal with the subject-matter of the contract and afterward disaffirm it. The election is with the party defrauded to affirm or disaffirm; but he cannot do both."

This principle applies *a fortiori* where there is no pretence of fraud; where no attack is made

on the *bona fides* of the contract; where there is no pretence that it was the result of collusion, undue influence, or of the taking of an unfair advantage, and where the beneficial nature of it is conceded. In such a case it would seem as though when one, whether an individual or a government, undertakes to enjoy the benefit of such a contract, it is tantamount to an adoption of its provisions, and that even in the absence of an express contract, an obligation *ex aequo et bono* to undertake the performance of the burdens, which are reciprocal to the advantages derived, will be implied.

This principle has been frequently applied by this Court.

> *United States* v. *Russell*, *13 Wall. 623.*
> *Hollister* v. *Benedict & Burnham Mfg. Co.*, *113 U. S. 59.*
> *United States* v. *Palmer*, *128 U. S. 262.*
> *Coleman* v. *United States*, *152 U. S. 99.*

It proceeds on the same equitable considerations, as the civil law doctrine of enrichment, which has been accepted as applicable to cases like the present.

Thus in the recent work of *Professor Cavalieri*, entitled "*The Doctrine of Succession of a State by a State*," *Pisa 1910, p. 135*, this great jurist, laid down what we believe should be accepted as the governing principle in the present case:

"The maxim that nobody is permitted to enrich himself, to the damage and injury of another, is the expression of a sentiment of equity and of justice, so elementary, that it is but logical that it should be recognized, in one form or another, and that it be given the sanctions contained in the

codes of various nations, which are founded upon it. It is given the sanction, which may well be called that of natural right, always strongly accentuated, constituting the basis and the foundation of all property and wealth, condemning that which does not find its root in natural justice; justice which gives to every one his due, and which permits nobody to enjoy with impunity that which belongs to another. The principle that nobody should be permitted to enrich himself unduly, belongs to that fundamental patrimony which lives in the juridical conscience of every people, and by which it attains its best support."

4. *The authorities on which the appellee relied below do not militate against the appellant's contentions.*

(*a*) The counsel for the United States has cited a passage from *Hall on International Law* in support of his contention to the contrary. But an examination of *Section 29* of *Hall on International Law, 4th Edition*, will indicate that he recognized the doctrine for which we contend, as applicable to contracts relating solely to the ceded territory; whereas the passages quoted on behalf of the United States relate to the general debt of a state, and not one relating solely to the ceded territory.

A careful reading of the same authority (*Hall's International Law, 5th Edition, pp. 91-92*) will show that the author distinguished between local rights and obligations and the general obligations of the ceding state. After showing that in the latter case, the obligation attaches to the former sovereignty, he shows that the contrary is the rule, where the rights and obligations are local, for he says:

"On the other hand, rights possessed in respect of the lost territory, including rights under

treaties relating to cessions of territory and demarkations of boundary, *obligations contracted with reference to it alone*, and property which is within it and has therefore a local character or which, though not within it belongs to state institutions localized there, transfer themselves to the new state person. Conversly, of course, the old state persons remains in sole enjoyment of its separate territory and of all local rights connected with it. Thus treaties of alliance, of guaranty, or of commerce, are not binding upon the new state formed by separation and it is not liable for the general debt of the parent state, but it has the advantages and privileges secured by treaty to its people as inhabitants of its territory or part of it, such as the right of navigating a river running through other countries upwards or downwards from its own frontier. *It is settled that local obligations*, such as that to regulate the channel of a river or to levy no more than certain duties along its course, *and local debts, whether for public dues contracted for local objects or debts secured upon local revenues, are binding upon it.*"

(*b*) The counsel for the United States has also quoted from an opinion of Mr. Magoon, while acting as the adviser of the War Department, with regard to the claim now under consideration, in which he directs attention to the report of the Transvaal Concessions Commission, dated April 19, 1901, appointed by the English Government "to inquire into the concessions granted by the government of the late African Republic."

It will be found that Mr. Magoon only partially quoted from this report, omitting passages which tend strongly to sustain our contention. The entire text, so far as it is relevant, will be found in the *Blue Book, South Africa, of June, 1901*, and in

1 Moore's International Law Digest, pp. 411-414, as follows:

"7. It is desirable to state here the broad principles which we considered applicable to the problem before us.

"8. On the 1st of September, 1900, her late Majesty annexed the territories and obliterated the sovereignty of the South African Republic. It has, therefore, become necessary that the new government should decide in what relation it stands to the concessions granted by the government of the late republic, and upon this point we submit the following observations:

"9. It is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognize them. But the modern usage of nations has tended in the direction of the acknowledgment of such contracts. After annexation, it has been said, the people change their allegiance, but their relations to each other and their rights of property remain undisturbed, and property includes those rights which lie in contract. '*La conquête change les droits politiques des habitants du territoire, et transfère au nouveau souverain la propriété du domaine public de son cédant. Il n'en est pas de même de la propriété privé qui demeure incommutable entres les mains de ses legitimes possesseurs.*'* Concessions of the nature of those which were the subject of our enquiry presented examples of mixed public and private rights; they probably continue to exist after annexaton until abrogated by the annexing state, and, as matter of practice in modern times,

*Translation. Conquest changes the political rights of the inhabitants of a territory and transfers to the new sovereign the property of the public domain of the ceding state. It is not the same with regard to private property, which remains unchanged in the hands of its original possessors. (Calvo: *International Law*, 2478).

where treaties have been made on the cession of territory, have been often maintained by agreement. In considering what the attitude of a conqueror should be towards such concessions we are unable to perceive any sound distinction between a case where a state acquires part of another by cession, and a case where it acquires the whole by annexation. The opinion that in general private rights should be respected by the conquerer, though illustrated and supported by jurisos by analogies drawn from the Roman law of inheritance, is based on the principle, which is one of ethics rather than of law, that the area of war and of suffering should be, so far as possible, narrowly confined, and that non-combatants should not, where it is avoidable, be disturbed in their business; and this principle is at least as applicable to a case where all as where some of the provinces of a state are annexed.

"10. Though we doubt whether the duties of an annexing state toward those claiming under concession or contracts granted or made by the annexed state have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice as to warrant their being termed rules of international law, we are convinced that the best modern opinion favors the view that, as a general rule, the obligations of the annexed state toward private persons should be respected. Manifestly the general rule must be subject to qualification, e. g., an insolvent state could not by aggression, which practically left to a solvent state no other course but to annex it, convert its worthless into valuable obligations; again, an annexing state would be justified in refusing to recognize obligations incurred by the annexed state for the immediate purposes of war against itself; and probably no state would acknowledge private rights, the existence of which caused, or contributed to cause, the war which resulted in annexation.

"11. Subject to these reservations His Majesty's Government in dealing with the conces-

sions in question will probably be willing to adopt the principle which, in the case of the annexation of Hanover by Prussia (the modern case most nearly corresponding with that under consideration), was purchased by the conquerers in the following terms: 'We will protect everyone in the possession and enjoyment of his duly acquired rights.' (Royal Prussian Patent, 3d Oct., 1866.)"

It is to be noted that, in paragraph 9 of this report, the doctrines announced by Chief Justice Marshall in *Soulard* v. *United States, 4 Pet. 511*, and *United States* v. *Percheman, 7 Pet. 51*, have been expressly recognized.

The opinion of Mr. Magoon has recently received severe criticism in *Benton's International Law and Diplomacy of the Spanish-American War, pp. 270-275, Chapter IX*, entitled "*Fulfillment of Treaty of Peace*," a work published in 1908.

It will be observed that the opinion of Mr. Magoon quotes from a report of General Greeley, the Chief Signal Officer of the United States Army, in which that distinguished officer recognizes the existence of an obligation on the part of the United States, to pay the subsidy which we are now seeking to recover.

In this connection attention is again called to the quotation from *Bentwich on Private Property in War*, (*supra*).

(*c*) The counsel for the United States has also attempted to argue from the protocol of the proceedings, between the American and English Commissioners, who negotiated the Treaty of Paris, and which is referred to on pp. *46 to 50* (*supra*) that the conclusion reached by the Commissioners is decisive against our present contention, inas-

much as the American Commissioners refused to bind our government, in express terms, to the obligations of the Claimant's contract.

We insist, however, that the protocol expressly negatives the idea, that the American Commissioners even contended that our government would not be bound by that contract. On the contrary, they stated that "it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of International Law" (*Senate Document 62, 55th Congress, Third Session, pp. 240-241*), and finally, on December 8, 1898, two days before the signing of the treaty, the American Commission explained its refusal to insert any clause in the treaty with regard to these contracts, by saying:

"It took this step because the nature, extent and binding obligations of these contracts are unknown to the American Commissioners, and they again disclaim any purpose of their government to disregard the obligations of International Law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory." (*Senate Document, No. 62, p. 262.*)

These proceedings were of a date subsequent to the correspondence referred to by the counsel for the United States and were the culmination of the negotiations between the American and the Spanish Commissioners.

Far from precluding the Claimant from enforcing the obligation of the United States under the doctrines of international law, which flows from the facts disclosed by this record, the American

Commissioners expressly recognized the existence of such obligation, as could be established against the United States "as successor in sovereignty in the ceded territory."

IV.

The judgment appealed from should be reversed, and judgment rendered in favor of the appellant on the demurrer interposed.

Louis Marshall,
Counsel for Appellant.

INDEX.

	Page.
Introduction	1
Explanation	2
Statement of the case	3
Abstract of petition	8
Demurrer	10
I. The petition does not disclose a cause of action within the jurisdiction of this court.	
II. The petition does not state facts sufficient to constitute a cause of action against the United States.	
That the petition does not disclose a cause of action within the jurisdiction of this court.	
I. History of the Court of Claims in regard to claims growing out of or dependent upon treaties	12
II. Action of Congress respecting the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties	15
III. The test of the Supreme Court of the United States in respect to the jurisdiction of claims growing out of or dependent upon treaties	18
IV. Comparison of the Tucker Act with section 1066, Revised Statutes, showing no conflict between the two	21
V. Section 1066, R. S., special legislation; the Tucker Act general legislation; the latter being subsequent to the enactment of the former, does not repeal	24
The petition does not state facts sufficient to constitute a cause of action.	
I. Eliminating the conclusions of law pleaded in the petition, there is no cause of action set forth	27
II. The treaty being silent about the assuming of the obligation, defendant is not bound to pay the same under the laws of nations or international laws	31
III. The nature of the obligation between Spain and appellant	35
(a) Spain was a monarchy, etc	36
The contract was a personal one	38
(c) It is an unsecured debt	39
(d) Spain could not limit the sovereignty of the United States over the Philippine Islands except by treaty	48
IV. The United States refused to pay the obligations of appellant, and Spain understood this	49
Conclusion	51

CASES AND AUTHORITIES CITED.

DECISIONS:

	Page.
Thirty hhds. Sugar *v.* Boyle (9 Cranch, 191, 198)	20, 34
U. S. *v.* Percheman (7 Pet., 51)	42
Hilton *v.* Guyot (159 U. S., 113)	42
Paquete Habana (175 U. S., 677)	43
Ex Parte Atocha (17 Wall., 439)	18, 22
Great Western Insurance Co. *v.* U. S. (112 U. S., 192)	18, 22
U. S. *v.* Kingsley (37 U. S., 476, 484)	19
Alling *v.* U. S. (114 U. S., 562)	22
U. S. *v.* Weld (127 U. S., 51)	22, 23
Rodgers *v.* U. S. (185 U. S., 83)	25
Maggone, Collector, *v.* King et al. (51 Fed. Rep., 526)	26
U. S. *v.* Mathews (173 U. S., 318)	26
U. S. *v.* Healey (160 U. S., 136)	26
South Carolina *v.* Stoll (17 Wall., 425)	26

TEXT WRITERS:

Moore's International Law Digest (vol. 1, p. 2, par. 2)	20
Moore's International Law Digest (vol. 1, p. 402)	33, 37
Moore's International Law Digest (vol. 1, p. 2)	34
Hall's International Law (4th ed., p. 99)	39
Law of Private Property in War, Norman Bentwich	47
D. Delfin Donadin y Buignau	48
John Bassett Moore	48

STATUTES AND DOCUMENTS:

Treaty of Peace, U. S. and Spain	3
Letter of E. Montero Rios, Pres. Spanish Peace Commission, to Wm. R. Day, Pres. Amer. Peace Commission	5
Letter of Wm. R. Day, Pres. Amer. Commission, to E. Montero Rios, Pres. Spanish Commission	5
Communication of Spanish Commissioners to American Commissioners	6
Communication of Pres. of Amer. Commission to Spanish Commission	7
Senate Document No. 62, 55th Cong., 3rd Sess.	5, 6, 7, 8
U. S. Stat. L., vol. 10, p. 610	12
U. S. R. S., sec. 1066	13
Tucker Act of March 3, 1887	14
Tucker Act of March 3, 1887 (sec. 1)	21
Judicial Code, 1911	15
House Document No. 783 (pt. 1, 61st Cong., 2d sess.)	16, 17
Letter, E. Montero Rios, Pres. Spanish Commission, to Wm. R. Day, Pres. Amer. Commission, Nov. 22/98	50
Letter Wm. R. Day, Pres. Amer. Commission, to E. Montero Rios, Pres. Spanish Commission, Nov. 22, 1898	50

APPENDIX:

Letter, of Hon. Whitelaw Reid	52
Declaration of Spanish Minister of Finance regarding colonial debts after treaty signed	53

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

EASTERN EXTENSION, AUSTRALASIA AND China Telegraph Company, Limited, appellant,
v.
THE UNITED STATES OF AMERICA. } No. 419.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF.

INTRODUCTION.

The above-entitled cause comes before the Supreme Court on an appeal from the Court of Claims from a finding sustaining a demurrer of the Government to claimant's petition.

The grounds of the demurrer were:

(*a*) That the Court of Claims did not have jurisdiction of the matters set forth in the petition, and

(*b*) That the petition did not state facts sufficient to constitute a cause of action against the United States.

The Court of Claims sustained the Government's demurrer.

EXPLANATION.

Before entering into a statement of the facts in this case, we call the court's attention to what will no doubt appear perfectly obvious upon further examination of the record and briefs, i. e., that the argument on the demurrer in the lower court practically resolved itself into a trial of the case, and that appellant, both by virtue of the record made in the lower court and its brief filed in this court, has waived the right to hold appellee to the strict rule governing a demurrer to a petition. On page 51 of his brief, counsel for appellant says:

> Appellee, by demurring to the question, has admitted the allegations.

Yet in his brief and argument in the lower court counsel did not hesitate to go outside of his petition and present in support of contentions made by him, and not found in the petition, documents which were offered in the negotiations leading up to the signing of the treaty of Paris. Furthermore, he offered correspondence of a member of the commission written subsequent to the signing of that treaty. (Letter Mr. Wm. R. Day to Hon. D. T. Watson, Oct. 4, 1899, p. 46, app's brief.) Apparently guided by the action of counsel, the learned judge of the lower court, in drafting his opinion, also considered matters not set forth in said petition, and incorporated some of these extraneous things in his opinion.

In his brief filed in this court, counsel has again left the confines of his petition and offered data and

based argument thereon in order, as it seems to us, to supply that which was lacking in his petition, and thus assist him to state a cause of action and come within the jurisdiction of the Court of Claims.

With the foregoing explanation we now turn to the statement of the case.

STATEMENT OF THE CASE.

On the 10th day of December, 1898, by a treaty executed at Paris, France, and subsequently signed by the President of the United States, with the approval of the Senate, the Government of Spain ceded *unconditional* sovereignty over the Philippine Islands to the United States. The language of the cession in Article III of the treaty is as follows:

> Spain *cedes* to the United States the archipelago known as the Philippine Islands * * *.
>
> The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

Now, previous to the transfer of this *unconditional* sovereignty and on, to wit, April 14, 1897, the Government of Spain granted a concessional contract to the Eastern Extension Australasia & China Telegraph Company, Limited, appellant, in consideration of the appellant constructing and maintaining a submarine cable and telegraph line from points on the following islands of the Philippines, to wit, from Luzon to Panay, from Panay to Negros, and from Negros to Cebu. Appellant completed

the cable and telegraph lines ready for traffic in October of 1897, and has ever since *owned*, *operated*, and *maintained* them. At no time has the United States *owned*, *operated*, or *maintained* said cable-telegraph system.

The interesting points which suggest themselves in this concessional contract are:

First. That it covers a period of 20 years.

Second. That the Spanish Government was to have all Government messages sent at half rates.

Third. That Spain was to pay an annual subsidy to the appellant company of £4,500 sterling during the life of the concession.

Fourth. That it is inferentially an exclusive and, therefore, a monopolistic concession.

Fifth. That the concession was a *personal* contract, which the *General* Government of Spain, a monarchical form of government, entered into with appellant; and was granted for the benefit of Spain.

Sixth. That the concession shows a continuing personal obligation, and does not show that the consent of the people of the Philippine Islands, or their representatives, was asked in creating this debt, nor was consent given by the people of the Philippine Islands, or their representatives.

It appears from the concession that the same will run until October, 1917, so that while appellant in this action is asking for a judgment of $109,462.50, being subsidy installments for the years 1905, 1906, 1907, 1908, and 1909, together with interest thereon, yet, if appellant's view prevails in this case, the

United States will no doubt be liable for the payment of the subsidy to the appellant from the year 1909 to the year 1917.

In the process of negotiating this treaty, the following are some of the incidents that occurred between the commissioners representing the United States and those representing Spain. After a great deal of discussion and offering of protocols from one side to the other, E. Montero Rios, the president of the Spanish commissioners, on November 22, 1898, addressed a letter to Mr. William R. Day (Annex 1 to protocol 16, S. Doc. No. 62, pt. 1, p. 216), calling for a special answer regarding the assuming of the colonial obligations of Spain by the United States, as follows:

> First. Is the proposition you make based on the Spanish colonies being transferred *free of all burdens, all, absolutely all, outstanding obligations and debts, of whatsoever kind* and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain?

To this letter Mr. William R. Day, president of the American commission, made the following reply (Annex 2, protocol 16):

> In this relation I desire to recall the statements in which the *American commissioners* have in our conferences *repeatedly declared that they would not accept any articles that required the United States to assume the so-called colonial debts of Spain.*
>
> *To these statements I have nothing to add.*

> But in respect of the Philippines the American commissioners, while including the cession of the archipelago in the article in which Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrones," or in an article expressed in similar words, will agree that their Government shall pay to Spain the sum of twenty million dollars ($20,000,000.)

Still not satisfied with the reply of the American commissioners, the Spanish commissioners again addressed the American commissioners on this same subject in the following article (S. Doc. No. 62, pt. 1, p. 240):

> Contracts formally entered into by the Spanish Government or its authorities for the public service of the islands of Cuba and Porto Rico, the Philippines, and others ceded by this treaty, and which contracts are still unperformed, shall continue in force until their expiration pursuant to the terms thereof. Such contracts as also cover the service peculiar to Spain or any of her other colonies, the new Government of the above-mentioned islands shall not be called upon to carry out, save only in so far as the terms of said contracts relate to the particular service or treasury of such islands. The new government will therefore, as regards the said contracts, be holden to all the rights and obligations therein attaching to the Spanish Government.

> List of pending contracts for public works and services. * * *
>
> *Cable contract, Manila to Hongkong, with another English company ("The Eastern").*

On December 1, 1898, the president of the American commissioners made the following statement in reply to the article presented by the Spanish commissioners:

> The president of the American commission stated that the American commissioners were constrained to reject these articles. The United States did not propose to repudiate any contract found upon investigation to be binding under international law, but no such clauses as now proposed had been inserted in treaties heretofore made by the United States with Spain, France, Mexico, and Russia for the acquisition of territory, and it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law.

The reply of the president of the American commission and all of the negotiations leading up to his reply were thoroughly understood by the Spanish commissioners, as is evidenced by the annex to protocol No. 21, as drafted by Emilio De Ojeda, found on page 258 of Senate Document No. 62, part 1, as follows:

> *It refuses also to stipulate anything in relation to the respect due the contracts entered into by a legitimate sovereign for public works and services*—contracts which materially affect the

rights of property of private individuals—which were respected in the treaties of Campo Formio of 1797, of Paris of 1814, of Zurich of 1859, of Paris of 1860, of Vienna of 1864 and 1866, and which Germany respected also when ending the war with France by the treaty of Frankfort of 1871. The American commission alleged as its only reason for this refusal that the United States in its treaties has never recognized these contracts.

When the treaty was finally drafted, Article III, hereinbefore quoted, was incorporated in the treaty without one word being said about the assuming of any of Spain's obligations in the Philippine Islands by the United States.

The treaty, together with all the clauses and protocols herein referred to, was presented to the President and Senate of the United States, and the same was ratified by the President with the consent of the Senate.

ABSTRACT OF PETITION.

The petition contains, briefly, the following:

(3) That Spain granted a concession to appellant on April 14, 1897, to construct, establish, and work three submarine telegraph cables in the Philippine Archipelago under the terms of the concession annexed to the petition and marked "Schedule B."

(5) That appellant, pursuant to the concession, completed the cables ready for traffic in October, 1897, and has ever since maintained and operated them.

(6) Appellant has at all times fulfilled the terms of said concession.

(7) Prior to December 10, 1898, Spain held absolute sovereignty over the Philippine Islands. On that day, at Paris, a treaty was duly entered into between the Government of Spain and the United States, whereby the Government of Spain ceded the Philippine Archipelago to the United States on the payment by the United States to Spain of twenty million dollars ($20,000,000); pursuant to said cession the United States of America acquired title to and jurisdiction over said Philippine Islands and over the islands of Luzon, Panay, Negros, and Cebu and the full right of sovereignty over said islands and all of the rights and obligations of Spain with respect thereto ceased.

(8) That thereupon the United States took possession and assumed the said sovereignty * * * and availed itself of all the benefits and advantages of the submarine cable and telegraph lines and used them.

(9) "*By reason of the premises the United States of America assumed all the obligations and the performance of all the conditions accepted by the Government of Spain and agreed to by it, according to the terms of its aforesaid concessions and of each of them, and agreed with the claimant to perform the covenants and agreements and to fulfill the conditions set forth in said several concessions, and accepted and agreed to by the Government of Spain.*"

(10) That the United States has failed to pay the subsidy for the years 1905, 1906, 1907, 1908, and 1909.

With this abstract of the petition before us, we shall now proceed to test its allegations by the demurrer.

THE DEMURRER.

OUTLINE OF ARGUMENT OF DEMURRER.

We propose to present the two grounds urged in the Court of Claims in the inverse order from that in which they were presented in the lower court, as follows:

I.

That the petition does not disclose a cause of action within the jurisdiction of this court.

II.

That the petition does not state facts sufficient to constitute a cause of action against the United States.

We shall treat the above subjects I and II under the following division of argument:

I.

THAT THE PETITION DOES NOT DISCLOSE A CAUSE OF ACTION WITHIN THE JURISDICTION OF THIS COURT.

FIRST.

A history of the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

SECOND.

The action of Congress respecting the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

THIRD.

The test of the Supreme Court of the United States in respect to the jurisdiction of claims growing out of or dependent upon treaties.

FOURTH.

Comparison of Tucker Act with section 1066, R. S., showing no conflict between the two.

FIFTH.

Section 1066, R. S., special legislation; the Tucker Act general legislation; the latter, being subsequent to the enactment of the former, does not repeal.

II.

THE PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

FIRST.

Eliminating the conclusion of law pleaded in the petition, there is no cause of action set forth.

SECOND.

The treaty being silent about the assuming of the obligation, defendant is not bound to pay same under the laws of nations or international law.

THIRD.

The nature of the obligation between Spain and appellant.

FOURTH.

The United States refused to pay the obligations of appellant, and Spain understood this.

I.

THAT THE PETITION DOES NOT DISCLOSE A CAUSE OF ACTION WITHIN THE JURISDICTION OF THIS COURT.

FIRST.

A history of the Court of Claims in regard to claims growing out of or dependent upon treaties.

Our proposition is that, admitting only for the purpose of argument, that any claim is alleged in the petition against the United States, then it is one growing out of a treaty. We contend, however, that section 1066 R. S., prohibiting the jurisdiction of the lower court in respect to claims growing out of treaties has never been repealed.

It is our belief that a study of the history of the jurisdiction of the Court of Claims, or, to be more particular, the limitation of jurisdiction of the court upon this subject, together with a study of the understanding of Congress and the views of the Supreme Court in cases where it has arisen, will be of great assistance. We therefore go back to the act of 1855 creating the Court of Claims (chap. 122, p. 610, vol. 10, U. S. Stat. L.), where we find that this court is given power to—

> hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, etc., etc.

This jurisdiction of 1855 was later enlarged in 1863 by amending the act of 1855 (chap. 92, p. 756, vol. 12, U. S. Stat. L.), so that—

> said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government against any person making claim against the Government in said court.

So far, then, there is no mention of the Court of Claims having jurisdiction of claims growing out of or dependent upon treaty stipulations entered into with foreign nations. But in this same act of 1863 Congress inserted a section, which has since been designated under the Revised Statutes as section 1066 of the Revised Statutes. We shall hereafter refer to it as section 1066, R. S.

This section is as follows:

> The jurisdiction of the said court shall not extend to any claim against the Government * * * growing out of or dependent on any treaty stipulation entered into with foreign nations. * * *

The gist of our argument at this time centers on the question of whether section 1066, R. S., has been repealed, either expressly or impliedly. It is the contention of counsel for appellant that certain parts of the act of 1887, commonly known as the Tucker

Act (24 Stat. L., 505), repealed section 1066, R. S. In his brief, on page 24, he says:

> There was a manifest inconsistency between that act and section 1066 of the United States Revised Statutes, and the latter must therefore be deemed to have been superseded by the former.

Appellant has quoted many cases in support of his contention which we do not admit are authority for that contention, and in arguing regarding the inconsistency which he alleges exists he has stated a conclusion to which we are unable to assent.

The part of the Tucker Act which it is urged repealed section 1066, R. S., is found in the italicized words set forth in the following section (sec. 1, ch. 359, p. 505, vol. 24, U. S. Stat. L.):

> All claims founded upon the Constitution of the United States or any law of Congress * * * or upon any regulation of an executive department, *or upon any contract, expressed or implied, with the Government of the United States*, or for damages, liquidated or unliquidated, in cases not sounding in tort, *in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable.*

And the repealing section, which is as follows (sec. 16):

> That all laws and parts of laws inconsistent with this act are hereby repealed.

In 1911, Congress codified the laws of the judiciary in an act entitled "An act *to codify, revise, and amend* the laws relating to the judiciary," approved March 3, 1911. A study of this law seems to us to shatter the position taken by appellant.

SECOND.

The action of Congress respecting the jurisdiction of the Court of Claims in regard to claims growing out of or dependent upon treaties.

It is well to note by way of preface that the Judicial Code of 1911, as it has been designated, contains not only section 1066, R. S., but also that section of the Tucker Act hereinbefore quoted, which, it is asserted, is in conflict with section 1066. *If there was a repugnancy* or conflict between the two sections *in 1887*, when the Tucker Act was passed, then *that repugnancy* or conflict *must have existed at the time of the passage of the Judicial Code in 1911*, and at all other times. And this being true, Congress ought not to have included in the Judicial Code the two sections said to be in conflict. However, Congress in the year 1911 evidently did not think that there was a conflict between the two sections heretofore quoted, and appellant practically concedes that Congress held this view in 1911, on page 39 of its brief, but it argues on the same page that because

Congress did not think so in 1911 does not avail us anything, for there is an hiatus between the year 1887, when the Tucker Act was passed, and the year 1911, when the Judicial Code was adopted, in which the views of Congress are silent.

It is further contended that the action in the case at bar was begun a year previous to 1911, and that appellant's case should be governed by the law in existence when the court's jurisdiction was invoked.

Our answer to this last contention is that the history of the passage of the Judicial Code absolutely refutes it.

We learn from House Document No. 783 (pt. 1, 61st Cong., 2d sess.) that a committee appointed by this Congress to revise and codify the judiciary laws submitted a report which gives light on this question. This committee, in drafting said report, took up each section of all the preceding acts of Congress relating to the jurisdiction and procedure of the Court of Claims, and reported under each section whether the same was "*existing law and no change whatever*" had been made, or if not existing law, then in what respect the same had been changed. On page 66 of said report, in commenting on section 158 of the bill as presented to Congress by this commission (section 158 being practically the same as section 1066, R. S., and the same as section 153 of the Judicial Code of 1911), the committee reported as follows:

> Section 158: *Existing law*, the only change being in the use of the word "first" for the word "one."

The *report* of the committee *was approved by Congress*, and the bill as presented by it, with the exception of a change in the number of the section from 158 to 153, was passed, and thus section 1066, R. S., became section 153 of the Judicial Code. What, then, is the effect of the committee's report that section 158 (being sec. 1066), was existing law previous to the passage of the Judicial Code, particularly in view of the fact that the records show that Congress adopted the committee's report and passed the bill as recommended by the committee with one or two minor exceptions not important here. The answer must be that Congress believed that previous to 1911, and, therefore, at all times since the enactment of section 1066, R. S., that the same had been existing law. Thus the period of time when the jurisdiction of the Court of Claims was invoked by appellant is covered by this report of the committee of Congress, and furthermore, Congress thought that section 1066 had been alive at all times since its enactment.

But if congressional history reveals the fact that the Court of Claims did not have jurisdiction over claims growing out of or dependent upon treaties, even more so do the rulings of the Supreme Court sustain this view.

THIRD.

The test of the Supreme Court of the United States in respect to the jurisdiction of claims growing out of or dependent upon treaties.

It is our purpose to analyze section 1066, R. S., in the light of cases passed on by the Supreme Court.

The first query that presents itself is, What is meant by "claims growing out of or dependent upon treaty stipulations with foreign nations"?

In the case of *Ex Parte Atocha* (17 Wall., 439), Mr. Justice Field, writing the opinion, said, on page 444, that:

> Those acts [meaning the act of 1863 and those previous to it] have since then applied only to claims made *directly* against the United States, and for the payment of which they were *primarily* liable, if liable at all, and not to *claims against other Governments, the payment of which the United States had assumed or might assume by treaty.*

Here, then, the Supreme Court says that since the passage of section 1066, R. S., the Court of Claims only has jurisdiction over claims where the United States was a direct party and on which it was primarily liable, and not over the claim of an individual against a foreign Government assumed by the United States by treaty.

In the case of *The Great Western Insurance Company* v. *The United States* (112 U. S., 192), Mr.

Justice Miller, on page 199, laid down an additional rule that jurisdiction over—

> treaty stipulations * * * is conferred by special act,

And—

> the authority of that court to hear and determine them is limited and controlled by the provisions of that act.

Again, in the case of *The United States* v. *Kingsley* (37 U. S., 476, 484), we are told that in construing a case arising under a treaty with Spain, whereby Florida was ceded to the United States, that the Supreme Court, interpreting an article of this treaty, held—

> * * * that the United States must maintain the rights of property under it by applying *the laws and customs by which those rights were secured* before Florida was ceded, or by which an inchoate right of property would, by laws and customs, have been adjudicated by Spanish authority, to have become a perfect right; by applying, in the first instance, in such cases, as was said in *Arredondo's case*, the principles of justice, according to the rules of equity; and in the second, all those laws and customs decisive of a right of property, whilst the party claiming the right was a subject of Spain.

And also—

> It (the court) has not, nor will it, apply, in the construction of such conditions in such cases, the rules of the *common law*.

Speaking of the law of nations in the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191–198), Chief Justice Marshall says on page 197:

> * * * This law is in part unwritten, and in part conventional. *To ascertain that which is unwritten*, we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations, under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. *The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.*

In Moore's International Law Digest (vol. 1, p. 2, par. 2), on this same subject, the writer says:

> * * * In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees of individual States regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts, and of ordinary municipal courts, purporting to be declaratory of the law of nations.

Summarizing the first two cases, we find that the Court of Claims has no jurisdiction of claims where the United States is not a direct party or primarily liable, or claims against other governments which the United States had assumed by treaty. Furthermore we learn, according to the other cases and authorities quoted, that jurisdiction where there is a treaty in-

volved is conferred by special act, and the authority of the court to hear and determine the stipulations of the treaty is limited and controlled by the provisions of the act granting such jurisdiction; that in questions growing out of a treaty we shall give *respect to the common law, but not be governed by it;* that we shall be influenced by the laws and decrees of individual States regulating international conduct, such as the decisions of international tribunals, the judgments of prize courts, etc. Let us then compare claims growing out of treaties with claims founded upon contracts express or implied.

FOURTH.

Comparison of the Tucker Act with section 1066, Revised Statutes, showing no conflict between the two.

What is meant by section 1 of the Tucker Act, which is as follows:

> *All claims founded upon* * * * *any contract, expressed or implied,* with the Government of the United States * * * in respect of which claims the party would be entitled to redress against the United States, either *in a court of law, equity, or admiralty* if the United States were suable.

If we read the entire section correctly and with an eye to the punctuation, does it not mean that the Court of Claims shall have jurisdiction of all claims founded upon—

(1) A contract, expressed or implied,

(2) With the United States in

(3) A court of *law* or a court of *equity* or a court of *admiralty*.

One thing seems certain, whether a claim be brought in any one of these three courts it must be founded upon a contract, expressed or implied.

Now, it is our understanding of an action founded upon a contract, expressed or implied, that we determine whether it is such according to the laws adopted by Congress, and that, in adjudicating such a claim, the courts take cognizance of the common law and statutory law of this country.

We do not understand that the jurisdiction of the court in a contract, expressed or implied, would depend upon a special act of Congress, and that the jurisdiction in such a case would be limited to the act conferring jurisdiction.

So it seems to us that in determining as to whether a claim growing out of or dependent upon a treaty comes within the jurisdiction of this court, the tests are so dissimilar from those required in determining whether the court has jurisdiction over claims founded upon a contract, expressed or implied, that there can be no conflict whatsoever.

Apropos of its theory of conflict, counsel for appellant in his brief (pp. 40–45) attempts to distinguish between the three cases, *The Great Western Insurance Company* v. *The United States* (112 U. S., 193), *Ex Parte Atocha* (17 Wall., 439), and *Alling* v. *The United States* (114 U. S., 562), all of which were handed down previous to the passage of the Tucker Act of 1887, and the case of *The United States* v. *Weld*

(127 U. S., 51), which arose after the passage of the Tucker Act. It is admitted by him that the first three cases referred to came within the terms of section 1066, R. S., and are authority for our contention that the Court of Claims did not have jurisdiction of the claims therein because the claims in all of these cases *grew out of a treaty*. But he argues that they are not authority against his contention in the case at bar, for the reason that the Tucker Act had repealed section 1066, R. S., when his client invoked the court's jurisdiction, and thus the Court of Claims had then jurisdiction over claims growing out of treaties. Aside from the fact that the history of the passage of the Tucker Act in 1887 in Congress, as set out hereinbefore by us, nullifies his theory that section 1066 was repealed, and that, therefore, all of the first three cases although having once been authority, are no longer so in regard to claims growing out of treaties, yet these three cases are also distinguishable from the case of *United States* v. *Weld* (127 U. S., 51) on another ground, i. e., that the claim in the latter case *does not grow out of a treaty*. For it was not charged in the latter case that the United States was directly or primarily liable on the claim, but it was charged that the claim therein alleged depended upon a *statutory provision* of Congress. The distinction is clearly made in the opinion of Mr. Justice Lamar, where he says:

> * * * We are of opinion, however, that a very broad distinction exists between those cases and this one. In the first case cited, by

the allegations of the petition itself, the claim was declared to grow directly out of the treaty and was thus clearly dependent upon it. *The petition based the right of recovery on the provisions of the treaty itself. No statute was invoked, nor was it charged that the United States was directly and primarily liable on the claim.* In the language of the court below, which we approve: "In that case the claimant corporation was not seeking to recover under any law of Congress, but was attempting to enforce an alleged implied assumpsit on the part of the United States, growing out of and dependent upon the treaty of Washington, notwithstanding the laws of Congress, which expressly excluded its claim from consideration and from payment out of the fund in controversy. Instead of founding its claim on any law of Congress, as do the present claimants, the company invoked the jurisdiction of this court to set aside and annul the statute provisions."

FIFTH.

Section 1066, R. S., is special legislation; the Tucker Act is general legislation; the latter being subsequent to the former does not repeal section 1066, R. S.

Section 1066 is legislation on a special subject. The rest of the act of 1863, in which section 1066 was originally incorporated, deals with the *affirmative general jurisdiction* of the court by increasing the jurisdiction

given the court by the act of 1855. Furthermore, jurisdiction is extended in respect to questions arising under a contract, expressed or implied, or for damages, liquidated or unliquidated, and not sounding in tort. But section 1066 deals with a peculiar special kind of legal jurisprudence, if it can thus be termed, i. e., claims growing out of a treaty. Furthermore, this section is a *limitation and express denial of the jurisdiction* of the court, whereas the rest of the act, except that part dealing with the statute of limitations, in so far as the jurisdictional part is concerned, *is affirmative*.

We take it that the usual rule of construction is that—

> Where there are two statutes, the earlier special and the later general (the terms of the general being broad enough to include the matter provided for in the special), the fact that the one is special and the other is general creates the presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. (*Rodgers* v. *United States*, 185 U. S., 83, syllabus.)

We quote in addition to this from other authorities as follows:

> A later act would not be held to qualify or repeal a prior one, unless there were a positive repugnancy between the provisions of the

new law and the old, and even then the prior law is only repealed to the extent of such repugnancy. (*U. S.* v. *Mathews*, 173 U. S., 388.)

And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. (*U. S.* v. *Healey*, 160 U. S., 147.)

If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be. (*S. C.* v. *Stoll*, 17 Wall., 431.)

The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable. (*Magone, Collector*, v. *King, et al.*, 51 Fed. Rep., 526, and cases cited.)

So then section 1066, R. S., being a limitation of the jurisdiction of the court upon a special subject, and the Tucker Act of 1887 being an extension of the court's general jurisdiction, and subsequent to the passage of section 1066, R. S., it would appear from the rule of construction of the Supreme Court that section 1066, R. S., is not repealed by the Tucker Act.

II.

THE PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As a preface to the present discussion we say, with the learned judge of the Court of Claims, that the lower court does not have jurisdiction of actions arising directly out of international law. We shall not pursue this subject further except indirectly, first, because it seems to us too self-evident to need further discussion, and, second, because appellant, though contending that it has a claim arising directly out of international law, does not in its brief argue with any conviction or support of authorities in point that the lower court has such jurisdiction, but merely assumes that it has.

So again predicating our argument on the assumption that appellant attempted to set forth a cause of action based on a claim growing out of a treaty, nevertheless we hold that the petition does not state a cause of action of any kind or nature whatsoever for the following reasons:

FIRST.

Eliminating the conclusions of law pleaded in the petition, there is no cause of action set forth.

We call particular attention to the conclusions found on page 6, paragraph 9, of appellant's brief, for the reason that the same seems to include all other conclusions previously pleaded, which is as follows:

> *By reason of the premises, the United States of America assumed all the obligations and the*

> *performance of all of the conditions accepted by the Government of Spain and agreed to by it,* according to the terms of its aforesaid concessions and of each of them, *and agreed with the claimant* to perform the covenants and agreements and *to fulfill the conditions set forth in said several concessions, and accepted and agreed to by the Government of Spain.*

We suggest that the conclusion in these lines is one drawn by the pleader himself, and, being a pleader's conclusion, would not add any strength to the petition, even if true. But we assert that the conclusion is not true, for the treaty is wholly silent about the United States assuming or agreeing to pay all or any of the obligations of Spain, and we are only bound by the terms of the treaty.

(*a*)

In order to prove the assertion that the conclusion is simply one of the pleader and not borne out by facts in the petition, we shall now examine that part of the petition preceding paragraph 9, wherein the allegations are set forth from which appellant draws the inferences stated in its conclusions. In substance it says that Spain owned the Philippine Islands and granted a concession to claimant; that Spain transferred the sovereignty and control over the islands to the United States by a treaty; that the United States assumed the sovereignty and control of the islands and over all the property and property rights and availed itself of the benefits and advantages of

the submarine cable and telegraph lines established, constructed, and operated by appellant.

Is there any allegation here that Spain was the owner of the submarine cable and telegraph lines? On the contrary, the concession set forth in schedule B and the petition itself, sections 4 and 5, show ownership in appellant.

(*b*)

Is there anything in the petition which shows that Spain had the right to transfer to the United States any of the obligations in the concession, without the consent of the appellant, and that appellant did consent? On the contrary, the concession (schedule B) shows that the contract was a personal one between Spain and the appellant, and there is nothing which shows Spain's right to transfer the subsidy obligation to the United States.

(*c*)

Is there any allegation in the petition showing that Spain did transfer to the United States the obligation covered by schedule B? The only source for the answer to this question must be found in the petition, and by the terms of the petition we are referred to the treaty, but the treaty is silent on this question.

(*d*)

Is there any allegation that the treaty specified the transfer of the obligation in schedule B by Spain to the United States, and the assumption of the obligation by the United States? The answer here is obviously in the negative.

If, then, the petition fails to allege—

(*a*) That Spain was the owner of the cables; or

(*b*) Had the right to transfer the obligation and claimant consented to the transfer; or

(*c*) That Spain did transfer the obligation and that the United States accepted the transfer; or

(*d*) That the treaty specified that the United States assumed the obligation.

On what facts, then, we ask, does the pleader base the conclusion that—

> the United States * * * agreed with the claimant to perform the covenants and agreements and to fulfill the conditions set forth in said several concessions, and * * *

This conclusion of the pleader is the very corner stone of the case which he has attempted to build up in his petition. But how is it to be held in its place without the necessary supporting allegations? If it be not supported by them, then according to the frequent rulings of this court it adds nothing to the petition, because it stands as a conclusion of law unsupported by allegations of fact.

It is then our first contention that, eliminating the conclusion of law hereinbefore set forth, the petition does not state a cause of action.

SECOND.

The treaty being silent about the assuming of the obligation, defendant is not bound to pay the same under the laws of nations or international law.

On page 45 of its brief, appellant raises this question in the following language:

> *Our claim is based upon those considerations of international law which have been stated with great clearness in the decisions of this court by approved text writers and jurists and in various State papers, cited under Point III.*

However, on page 15 of its brief appellant bases its claim on what seems to us to be a totally different ground, in the following language:

> *The appellee incurred liability on a contract, express or implied.*

Examining these two claims with the one set forth in the petition, i. e., a claim growing out of a treaty, it appears to us that appellant has changed its own views of the case three times. First, according to the evident intent of the pleader, there was an attempt in the petition to set up a claim growing out of and dependent upon a treaty. Second, the claim (p. 45 of appellant's brief) was founded upon—

> those considerations of international law which have been stated with great clearness in the decisions of this court. * * *

And, third (p. 15 of appellant's brief) —

> the appellee incurred liability on a contract, express or implied.

So far as we are able to analyze these three sources from which appellant's claim is said at different times to have come, it is our view that none of them is tenable, for the following reasons:

(1) A treaty is a contract between nations; the binding force of that contract coming from the consent of the nations, their intention is determined by the terms of the treaty, whereas —

(2) A contract, express or implied, such as is referred to in the Tucker Act, is a contract whose force is derived from the laws adopted by the people of a single nation, such as the United States, and the law applied to the interpretation of the contract is the common law and statutory law adopted by our country; while on the other hand—

(3) Claims growing out of international law differ from either of the other forms of claims, because they are not limited by the terms of a treaty necessarily, nor the common law, nor statutory law of the United States. The authorities hold that the common law, in claims arising out of international law, may simply be given consideration, but shall not necessarily be binding. Furthermore, claims growing out of international law acquire their force and interpretation from those rules by which a nation consents to abide when it enters into the intercourse of civilized nations; such rules being drawn

from the customs of the high seas, the decisions of prize courts, etc. This matter is well set forth in Moore's International Law Digest (vol. 1, p. 402), as follows:

> The fact that in certain treaties of cession contracts, regularly entered into for objects of public interest specially concerning the ceded territory, are taken over by the new sovereignty, can not be accepted as proving that without treaties all such contracts become obligatory upon the acquiring sovereignty. The stipulations of treaties are sometimes confirmatory of the law of nations, sometimes different from it. Presumably they should be regarded as not identical with it, since nations may well be presumed not to make unnecessary stipulations or fail to obey the law of nations.
>
> Calvo (sec. 101) does not seem to regard such treaties as mere repetitions of the law of nations; and Hall (sec. 27, note) reminds us of the motives of policy which govern the making of these as of other treaties. The stipulations are no doubt the result of the existence of general principles of the law of nations concerning debts and contracts as affecting an acquiring sovereignty; but those principles may well fall short of the proposition that all executory contracts by the central government for imperial rights and privileges, as well as local benefits, become obligatory as such contracts in all their terms upon the victorious sovereign acquiring the locality.

Having already subjected the petition to a test as to whether the claim herein made arises out of a treaty or upon a contract, express or implied, we shall now subject it to a test as to whether the claim made in the petition obligated the appellee to assume and pay the obligation under the rules of international law. The question then arises what are the rules of international law? Speaking of international law, Mr. John Bassett Moore in his book entitled "Moore's International Law Digest" (vol. 1, p. 2) said:

> Though on many subjects the rules of international law are clear and precise, yet, as often happens with municipal law, the rule applicable to a particular case may be uncertain and difficult of ascertainment. In such cases an appeal is made to the authority of writers; to the provisions of treaties disclosing a consensus of opinion; to the laws and decrees of individual States regulating international conduct; to the decisions of international tribunals, such as boards of arbitration; and to the judgments of prize courts and of ordinary municipal courts purporting to be declaratory of the law of nations.

And Mr. Chief Justice Marshall in the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191, 198) said:

> The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights which are recognized by all civilized and commercial States throughout Europe and America. This law is

> in part unwritten and in part conventional. To ascertain that which is unwritten we resort to the great principles of reason and justice; but as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received not as authority but with respect. The decisions of the courts of every country show how the law of nations in the given case is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Keeping in mind the definitions laid down by the two great authorities heretofore quoted from, we propose to analyze the nature of the obligation between Spain and appellant, which, it is claimed, the United States has assumed, under the following heads:

THIRD.

The nature of the obligation between Spain and appellant.

(*a*) Spain was a military monarchy; the people of the Philippine Islands were not represented in the making of the contract, nor was their consent asked or given.

(*b*) The contract was a *personal* one between Spain and appellant for the *general* benefit of Spain.

(*c*) An unsecured obligation.

(*d*) Spain could not limit the sovereignty of the United States over the Philippine Islands except by treaty.

(*a*)

Spain was a military monarchy, etc.

The Spanish Government was a monarchial form of government, and we here suggest that this court take judicial notice that it was also a military monarchy at the time this concession was made to appellant, in so far as the Philippine Islands were concerned. It is an historical fact that in 1896 the Aguinaldo insurrection had started, and that it was not suppressed in 1897. The purpose of Spain in granting the concession is apparent when we note that it consisted of the right to control the use of the cable lines and the right to censor messages and to take over the management of the cable lines under certain conditions.

We submit that it is a fair inference that Spain granted the concession in order to have a better means of controlling the islands. There is nothing in schedule B that indicates that the cable and telegraph lines were constructed for the profit and benefit of the people of the Philippine Islands. The

Government of Spain was to have its messages sent at half rates, but not so with the people of the Philippine Islands. Whatever benefit the people of the Philippine Islands derived from the use of the cable and telegraph lines, if any, was incidental to the purpose for which the cables were laid.

In discussing such a situation, a writer in Moore's International Law Digest (vol. 1, p. 402) says:

> As I have suggested, these concessions, made by a military monarchy for cables and railroads through its colonies, were by no means entered into without regard to the benefit and convenience of the central government as sovereign over the colonies. They were, and this appears upon their face, concerning instruments with which the monarchy was to govern more easily and conveniently the subject colonies for the general benefit of Spain as well as their own.
>
> To regard them as exclusively for local benefit would, therefore, be to ignore obvious facts.

In arguing that the cable system was for the benefit of the people of the islands, appellant, on pages 51 and 52 of its brief, states the following:

> The claimant, in conformity with all of the conditions imposed upon it, *created for the Philippine Islands instrumentalities of government and commerce, for such these cables concededly are.*
>
> (*b*) These instrumentalities of government and of commerce provided by the claimant, at

> its expense, related solely to the Philippine Islands, as a colonial possession, *and were for their benefit and advantage, and not for the general purposes and advantages of the Spanish Government as the parent State.*

But we submit that the allegations in the italicized lines are not supported by any allegations in the petition, and are a mere claim on the part of appellant.

(*b*)

The contract was a personal one between Spain and appellant, etc.

The contract between Spain and appellant was a personal one. By this we mean that the parties to the contract were personally liable to each other to do their several parts. Spain and appellant could contract like two individuals, and they did so in this instance. We take our authority for stating that a State can contract and bind itself just as an individual, and will be considered as an individual, where the contract is brought into question in court, from a case quoted by appellant on page 71 of its brief, i. e., *People* v. *Stephens* (71 N. Y., 549), which holds as follows:

> The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for

> the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.

In Hall's International Law (4th ed., p. 99) he says:

> The fact remains that the general debt of a State is a personal obligation. The case also of the creation of a new State out of part of an old one is not distinguishable, so far as the obligation to apportion debts is concerned, from that of the cession of a province by one State to another. When the latter occurs, at least as the result of conquest, it is not usual to take over any part of the general debt of the State ceding territory.

(*c*)

It is an unsecured debt.

We mention this because while we do not conceed that a nation taking over the sovereignty over a territory from another nation is bound to pay any of the

obligations of the former sovereign not covered by treaty, yet, nevertheless, there are some instances where the claims upon the good will and grace of the grantee sovereign, as, for example, a secured debt, would suggest the payment of obligations incurred during the control by the former nation. Such is the case where money has been advanced for the benefit of a particular locality or improvements made thereon and that particular territory which is the recipient of the money or the improvements is encumbered with a lien for the payment of the sum advanced or the improvements made. This, however, is not the case at all in the claim made by appellant, for it is one which was assumed by the General Government of Spain for the benefit of the General Government. The islands of the Philippines were not encumbered by any lien whatsoever, nor was there any mortgage given or bonds assumed for the payment of the subsidy.

Summarizing, then, the contentions made by us in (*a*), (*b*), and (*c*), we submit that Spain at the time of the incurring of the obligation was a military monarchy and contracted the debt for the benefit of Spain in general, and not by or with the consent of the people of the Philippine Islands, or for their benefit; that the contract between Spain and appellant was a personal one, and that Spain is bound under this contract just as an individual would be; that the claim of appellant is an unsecured one, and, therefore, not a lien on the Philippine Islands or any part thereof.

How, then, could Spain, being a sovereignty which has not ceased to exist, and, therefore, being the same as a person bound upon a contract, escape the personal liability on this contract unless the United States agreed in writing to take it over? Appellant's reply is that we did agree by the rules of international law. How, when, and where did we agree? The only contract we have any knowledge of with Spain is the treaty, which is silent. Appellant's answer is found partly in one statement in its brief on page 53, and is as follows:

> On the acquisition by the United States of sovereignty over the Philippine Islands, the claimant's private rights of property were in no manner affected by the change of sovereignty, and the rights vested in it, both contractual and otherwise, and executory as well as executed, remained enforceable in accordance with the principles of international law.

And partly in another statement in its brief, on page 59, which is as follows:

> Under the established doctrines of international law, where a part of the territory of one nation is annexed by cession or otherwise to the territory of another, the latter, by the act of annexation, becomes bound to fulfill all the obligations which pertained to the former in respect of the territory acquired and the property therein. It practically inherits the rights and obligations of the ceding state.

In support of its theory, as found on page 53, appellant quotes from Mr. Chief Justice Marshall in the case of *United States* v. *Percheman* (7 Pet., 51). The doctrine laid down in this case can not be disputed.

Mr. Chief Justice Marshall said:

> The King cedes that only which belongs to him; lands he had previously granted were not his to cede.

The foregoing quotation crystallizes the point in this case. Spain had given a certain contract for a right to appellant, which was a personal one. Spain through its monarch could cede only that which belonged to the Government. Rights which it had previously granted were not hers to cede. But appellant goes a step further on page 59 of its brief. What is the practical meaning of these words quoted from its brief? Is it not that appellant says that the United States must not only recognize the private property rights of those occupying the ceded territory so far as they are related to each other, and in so far as the former Government of Spain granted such property rights to individuals, but that the United States must go further and *assume, take over, and agree to pay any debts or obligations connected with such private rights.*

This doctrine is so astounding that we are led to at once examine the cases appellant cites as authority to see how they bear out its contentions. In the case of *Hilton* v. *Guyot* (159 U. S., 113) we find the facts to be that a citizen of France sued a citizen of the United States in the French courts and obtained

a judgment against the defendant. The French citizen then transferred his action to the United States and brought suit on the judgment obtained in France. The question was whether, under the circumstances and in the absence of a treaty or act of Congress, the judgment could be opened and reexamined upon its merits in the United States courts. Or, in other words, what force was to be given to a foreign judgment against a citizen of this country in our courts. How do the facts in such a case, by analogy or otherwise, support the contention of appellant that the United States is bound to assume and pay the personal obligation of Spain because Spain transferred the sovereignty over the Philippine Islands to the United States?

To our mind this case simply determined that the United States must respect the private rights of its citizens and aliens within its borders, and the question to be determined, so far as international law was concerned, was, What weight should be given in our courts to a judgment obtained in a foreign country against one of our citizens? Surely it is not authority for the contention made that the United States by the rules of international law must assume and pay a personal debt of Spain because Spain transferred the sovereignty over the Philippine Islands to the United States.

In the next case cited by appellant, i. e., *The Paquete Habana* (175 U. S., 677), the facts were that at the outbreak of war between Spain and the United

States two fishing smacks owned by Spanish subjects residing in Havana were on a fishing voyage off the coast of Cuba, sailing under the Spanish flag. Near Havana they were overtaken by the United States blockading squadron and were brought into port; at the time they were taken the crews did not know that war had been declared nor did they have any arms or ammunition on board. In port the boats and cargoes were condemned and sold by our officials as prizes of war.

The question in this case was, Were the vessels subject to capture by the United States, and, if not, was the United States liable to pay the claimants for the price of the vessels, the cargo of fish, and damages? In other words, was it the unlawful taking of private property by the United States? The court held that it was an unlawful taking, and the claimants were reimbursed.

But in the case at bar there is no claim in the petition or otherwise that the United States took any property from anyone, nor does appellant claim that property was taken. There is *no allegation that the United States owns* the cables or ever was the owner. On the contrary, we have asserted that the petition admits ownership, now and at all times past, in the claimant.

If the United States had taken the cable and telegraph lines away from appellant on the transfer of the sovereignty by Spain to the United States over the islands, and thereupon dispossessed appellant of its property and then pocketed the receipts from the

cable and telegraph lines, or sold the cable and telegraph lines and then held the money derived therefrom, there would be some similarity between *The Paquete Habana case* and the case at bar.

But we have never claimed title in the cable and telegraph lines, nor did we ever dispossess appellant of its property or sell the property and pocket the receipts. We have not derived one dollar in any way, shape, or form from this property. In fact, the Government is paying for every message which it sends and has at all times paid appellant for its messages.

Appellant in its brief has quoted from many eminent authorities, but with due respect to the acumen of counsel we are unable to see wherein they are in point.

To repeat his contention, as we understand it, the United States under the laws of international law is bound to pay a personal obligation of Spain, a nation still in existence, because Spain transferred a piece of territory to us, the people of which had no voice in creating the obligation, or ever assumed it, the obligation being a general one for the benefit of Spain and not for the benefit of the islands.

The authorities quoted from, however, treat of cases wherein the facts are entirely different. For example, some of them discuss the situation where a conquering nation completely wipes out the sovereignty of the other nation and destroys its entity, leaving the creditors of the defeated nation without any recourse. Such facts do not fit the case at bar,

for Spain as a nation still exists and still has contractual powers and can pay obligations; or

These authorities treat of cases where a conquering nation annexes a piece of territory belonging to the defeated nation; the annexed territory by the consent of its people has been the recipient of some public improvement, which was intended for the profit of the residents. Such facts will not fit the case at bar, however, for the profit was not for the people of the Philippine Islands, and the cables were not put there with their consent. As we have said, they were a vehicle by which Spain could better control the government of its islands. Spain received additional benefit by reason of the fact that it paid one-half rate for its messages.

Again, these authorities treat of cases where a nation has been split up into smaller parts and the parts become independent sovereignties. Previous to the division, obligations have been incurred by the general government for the benefit and with the consent of all. These debts are prorated among the separate sovereignties. It is only fair to the creditors that each smaller separate sovereignty should pay its pro rata share. Such facts, however, do not fit the case at bar; or

These authorities treat of cases where nations succeeded to the sovereignty over a territory ceded by another, to wit, as in the case where Spain ceded Florida to the United States. In claims arising under this cession the principle has been laid down

that the United States must respect the titles granted by Spain to the owners of land in the territory ceded, but this is not our case, for in the case at bar the demand is made that the United States shall not only respect the private rights of claimants and the title that Spain gave them, but that we must assume Spain's obligations; or,

Lastly, these authorities treat of a case such as was referred to on page 64 of appellant's brief, wherein quoting from Mr. Norman Bentwich on the Law of Private Property in War, it is said:

> In the terms of peace between England and the Boers, she covenanted to devote £3,000,000 to cover war losses, which included losses by requisition and seizure of property by the enemy State; or, in other words, contracts made by the conquered Government. But Mr. Chamberlain declared, in the House of Commons, that *this was "an act of grace, without admitting any liability."* Finally, there has come the declaration of the Divisional Court that "there is no principle of international law by which, after conquest, the conqueror becomes liable, in the absence of express stipulation to the contrary, to discharge the financial liabilities of the conquered State incurred before the outbreak of the war."

It might be pertinent at this point to recur to the fact that the *doctrine* laid down in the last quotation *is from* the *English courts*, and the *claimant* herein a *British corporation*.

(*d*)

Spain could not limit the sovereignty of the United States over the Philippines Island except by treaty.

This brings us to the question as to what is meant by sovereignty? For reply we quote from a famous Spanish writer, D. Delfin Donadin y Buignau, who says that it is—

> the right which a nation has of organizing the public powers in such a way as it may deem advisable.

In commenting upon this definition in annex to protocol No. 5 (p. 48, S. Doc. No. 62, pt. 1, 55th Cong., 3d sess.), which document was one of those passing between the American and Spanish commissioners in negotiating the treaty of Paris, the author, Mr. John Bassett Moore, says:

> National sovereignty, as defined by high Spanish authority, is "the right which a nation has of organizing the public powers in such a way as it may deem advisable." *This right, though it includes the power to contract obligations, is in no sense composed of them.* The thing done in the exercise of sovereignty is not a part of the sovereignty itself; the power to create is not the thing created. Nor is it possible to shut our eyes to the fact that in the Spanish memorandum the term obligations is used indiscriminately in respect of two different things, namely, the duties which a

> sovereign as such owes to his subjects, and the debts which he may specially contract in the exercise of his sovereign power for his own purposes.

It would seem from these two authorities that two propositions are clear, (1) that the obligations which a nation incurs are not a part of sovereignty, as counsel for appellant evidently believes, but that sovereignty once granted gives the grantee the power to incur obligations, and (2) that the transfer of sovereignty contemplates the complete and unlimited transfer of authority, and that complete and unlimited sovereignty is not transferred if loaded down with the obligations of the grantor.

Where are we to find, and how are we to determine, whether the sovereignty which the grantor passes to the grantee is free and unlimited? The answer is in the treaty. Yet the treaty in this case is silent about the assumption of any obligations by the United States or the transfer of any by Spain, as we see when in article 3 it states that "Spain *cedes* to the United States the Philippine Archipelago."

FOURTH.

The United States refused to pay the obligations of appellant and Spain understood this.

Under this heading we shall refer to the letters passing between the American and Spanish commissioners, and the articles as previously quoted in our *statement of fact* in this brief, but for the sake of brevity we will not requote them in full here.

In the letter from E. Montero Rios, president of the Spanish commissioners, to Mr. William R. Day, president of the American commissioners, dated November 22, 1898, the specific question is propounded in language that can not be misunderstood, as to whether the United States would assume sovereignty over the Spanish colonies "*free of all burdens, all, absolutely all, outstanding obligations and debts of whatsoever kind* and whatever may have been their origin and purpose, remaining thereby chargeable exclusively to Spain."

Replying to this statement, Mr. William R. Day, in a letter of the same date, gives a statement that is worthy of analysis. He says that he will answer the inquiry *seriatum*. Then he takes up the inquiry heretofore quoted from the letter of E. Montero Rios and says emphatically *that the United States would not assume the so-called colonial debts of Spain*. In the last paragraph Mr. Day declares as follows:

> But in respect of the Philippines the American commissioners, while including the cession of the archipelago in the article in which Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrones," or in an article expressed in similar words, will agree that their Government shall pay to Spain the sum of $20,000,000.

It is the theory of appellant that the United States paid $20,000,000 for the Philippine Islands, and that in doing so the said sum had nothing to do

with the payment for various improvements or obligations arising therefrom as made by Spain on the islands. But how can such a theory be true if we accept the literal interpretation of Mr. Day's letter, i. e., that they would not accept any articles that required the United States to accept the so-called colonial debts of Spain? Does not this reply of Mr. Day's, taken in connection with the letter of E. Montero Rios, mean, figuratively speaking, that Mr. Day points to the treaty and says, Here is the treaty. We are willing to pay $20,000,000 for any improvements on the Philippine Islands, but we are not willing to assume any of the obligations of Spain on those islands, and we will therefore leave the treaty silent as to the payment of any of these obligations.

CONCLUSION.

We respectfully submit that, in our opinion, the judgment of the lower court should be sustained.

HUSTON THOMPSON,
Assistant Attorney General.

WILLIAM F. NORRIS,
Attorney

APPENDIX.

Documents and information not properly within record, but throwing light on contentions made by appellant.

In a communication to the Anglo Saxon Review, made in June, 1899, some time after the signing of the treaty, Mr. Whitelaw Reid, a member of the American commission which drafted the treaty, gives a most enlightening statement regarding the refusal to assume the colonial debts of Spain and the reason why $20,000,000 was paid for the improvements made by Spain in the Philippines.

The communication is as follows:

> Warned by the results of inquiry as to the origin of the Cuban debt, the American commissioners avoided undertaking to assume this *en bloc*. But in their first statement of the claim for cession of sovereignty in the Philippines they were careful to say that they were ready to stipulate "for the assumption of any existing indebtedness of Spain incurred for public works and improvements of a pacific character in the Philippines." Not till they learned that of this entire "Philippine debt" (only issued 1897) over one-fourth had actually been transferred to Cuba to carry on the war against the Cuban insurgents and finally against the United States, and that the most

> of the balance had probably been used in prosecuting the war in Luzon, did the American commissioners abandon the idea of assuming it. *Even they they resolved, in the final transfer, to fix an amount at least equal to the face value of that debt, which could be given to Spain as an acknowledgment for any* pacific improvements she might ever have made there not paid for by the revenues of the islands themselves. She could use it to pay the Philippine bonds if she chose. That was the American view as to the sanctity of public debt legitimately incurred in behalf of ceded territory; and that is an explanation of the money payment in the case of the Philippines, as well as of the precise amount at which it was finally fixed.

It is of peculiar significance that as late as July, 1899, the Spanish Government believed that it was still bound by the concessional contract with appellant. In Magoon's Report on the Law of Civil Government Under Military Occupation (p. 185) he says:

> In July, 1899, the Spanish minister of finance submitted to the Cortes a proposed law for the reorganization of the debts of Spain. In presenting said law Senor Villverde, Spanish minister of finance, stated that the Spanish Government declares that it does not consider that the question of the debts of the colonies ceded and relinquished by Spain were finally settled by the negotiations at Paris nor by the ominous silence of the treaty of peace on the matter. He insisted that the Spanish Government still has the right to insist

that where the revenues of a colony were mortgaged or pledged for the payment of a debt the revenues of the territory constituting said colony should be applied to the payment of said debts, although said territory had been ceded to another sovereignty which refused to take over said obligations and was collecting revenues by virtue of its own right to levy and collect them. The finance minister's official statement was published in the Madrid Gazette and republished by the press of this country.

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EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 419. Argued October 22, 1913.—Decided December 1, 1913.

While the act of March 3, 1887, c. 359, 24 Stat. 505, broadened the general jurisdiction of the Court of Claims, it was not repugnant to, or inconsistent with, the limitations of § 1066, Rev. Stat., expressly excluding from such jurisdiction all claims growing out of treaty stipulations, and it did not, therefore, repeal that section.

Claims based on treaty stipulations within § 1066, Rev. Stat., include those which arise solely as the result of cession of territory to the United States.

The policy and spirit of a statute should be considered in construing it as well as the letter.

Although the Court of Claims has not jurisdiction of claims against the United States based on treaty stipulations, it has jurisdiction of claims based on contracts originally made with the former sovereign of ceded territory and assumed by the United States after the cession either expressly or by implication.

Where the court below declined to take jurisdiction and the appeal is solely on that question, this court will not express any opinion on the merits as they are not before it.

48 Ct. Cl. 33, reversed.

THE facts, which involve the jurisdiction of the Court of Claims, are stated in the opinion.

Mr. Louis Marshall for appellant.

Mr. Assistant Attorney General Thompson, with whom *Mr. William F. Norris* was on the brief, for the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims which dismissed, upon demurrer, the petition of the claimant for the want of jurisdiction. 48 C. Cls. 33.

The petition averred that the claimant, a British corporation, secured from the Government of Spain, in the year 1879, a concession for the construction and operation of a submarine telegraph cable between the island of Luzon and Hong Kong, with an exclusive privilege for forty years, under which it maintained a cable from Hong Kong to Bolinao; and that in 1897, the Government of Spain granted a further concession for three submarine telegraph cables to provide communication between the Islands of Luzon, Panay, Negros and Zebu, in the Philippine archipelago. Among the conditions of the last-mentioned grant, a copy of which is annexed to the petition and made a part of it, are the following:

"Article 9. The Concessionaire undertakes to work, at his own expense and risk, the Cables of this Concession for a period of twenty years, the said term to begin from the date of the taking over of the Cables and their adjuncts in perfect working order.

"Article 10. The Concessionaire shall enjoy an annual subsidy of £4,500 (four thousand five hundred pounds sterling), payable monthly in twelve instalments, during the whole term of the working of the Cables, the said payments being made at Manila by the Chief Treasury Office of those Islands.

"Article 16. The Company holding the Concession shall pay the State the ten per cent. which tax in its application to cablegrams is fixed after first deducting the amount of the expenses for the maintenance of the Stations, calculated at £6,000 (six thousand pounds sterling) per annum, the said expenses not to exceed the amount specified.

"Article 17. It shall be obligatory to transmit official despatches, which shall enjoy precedence, at half the rates charged for those of a private character. . . ."

In March, 1898, the claimant obtained an additional concession from the Government of Spain for a submarine telegraph cable between Hong Kong and Manila which was completed in the following month.

It was further alleged that the claimant had "actually fulfilled" and continued "to fulfill" all of the conditions of the concessions and "to perform all of the duties imposed upon it" by their terms. After setting forth the making of the Treaty of Paris, and the cession thereby to the United States of the Philippine Islands, the petition continued:

"Thereupon the United States of America entered into the occupancy of said Philippine Islands, and proceeded to exercise sovereignty over said Islands and of the inhabitants thereof, and to assume jurisdiction and control

over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed and operated by the Claimant, and availed itself of all of the benefits and advantages thereof, using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do, and it has become in all respects the successor of the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concessions. . . .

"By reason of the premises the United States of America assumed all of the obligations and the performance of all of the conditions accepted by the Government of Spain and agreed to by it according to the terms of the aforesaid concessions . . . and of each of them, and agreed with the Claimant to perform the covenants and agreements, and to fulfill the conditions, set forth in said several concessions and accepted and agreed to by the Government of Spain.

"The United States of America has failed to perform said agreements and to fulfill the said conditions, in that it has failed and refused to pay to the Claimant the annual subsidy of £4,500 sterling as required by the terms of Article 10 of the aforesaid concession . . . for the years 1905, 1906, 1907, 1908 and 1909, and for each of said years, and by reason of such failure and refusal to pay it has become indebted to the Claimant in the sum of £4,500 sterling for each of said years, with interest on each of said annual instalments at the rate of six per cent per annum from the 31st day of December of the year in which the same became payable."

And judgment was demanded accordingly for the sum of $109,462.50, with interest as stated.

The Government demurred to the petition asserting

(1) that it did not set forth facts sufficient to constitute a cause of action against the United States and (2) that it did not disclose a cause of action within the jurisdiction of the court.

Upon hearing, the court held that it was without jurisdiction and it was upon this ground that the petition was dismissed. 48 C. Cls. 33.

The act of February 24, 1855, c. 122 (10 Stat. 612), creating the Court of Claims, provided that it should hear and determine all claims "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," and also all claims which might be "referred to said court by either house of Congress." It required the court to report to Congress the cases upon which it had finally acted, stating the material facts found with its opinion, and to prepare such bills as would be appropriate, if enacted, to carry its decisions into effect. Important amendments were made by the act of March 3, 1863, c. 92, 12 Stat. 765, which gave jurisdiction of set-offs and counter-claims, authorized appeals to the Supreme Court and provided for payment of final judgments out of any general appropriation made by law for the satisfaction of private claims.[1] But at the same time Congress was careful to exclude from the jurisdiction of the court such claims as arose out of treaty stipulations. (*id.* § 9; 12 Stat. 767). As was said in *Ex parte Atocha*, 17 Wall. 439, 444: "All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants; . . . Those acts have since then applied only to claims made directly against

[1] Cf. Act of March 17, 1866, c. 19, 14 Stat. 9; *United States* v. *Alire*, 6 Wall. 573, 576.

the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty."

The provisions of the act of 1855, as amended, relating to jurisdiction were placed in § 1059 of the Revised Statutes; and § 9 of the act of 1863 became § 1066 of the revision, as follows:

"SEC. 1066. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

By the act of March 3, 1887, c. 359 (24 Stat. 505), the general jurisdiction of the court theretofore defined by § 1059 was broadened, and it was thus provided:

"That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court."

The statute of 1887 repealed all inconsistent enactments. The question whether § 1066 was thus repealed has been raised but not decided. *United States* v. *Weld*, 127 U. S. 51, 57; *Juragua Iron Company, Limited*, v. *United States*, 212 U. S. 297, 310. Both the provisions above quoted and those of § 1066 are incorporated in the Judicial Code (§§ 145, 153). It is argued that the act of 1887 was intended to provide a complete scheme for the bestowal of jurisdiction over all claims against the Government, save those therein expressly excepted, and that, hence, it must be regarded as a substitute for the provisions of the Revised Statutes including § 1066 which should therefore be deemed to be repealed (*United States* v. *Tynen*, 11 Wall. 88, 92; *The Paquete Habana*, 175 U. S. 677, 684, 685). We cannot accede to this view. The question is one of legislative intent (*United States* v. *Claflin*, 97 U. S. 546, 551). The section dealt with a special class of cases. There is no essential repugnancy between the broadening of the general provisions as to jurisdiction and the maintenance of the limitation as to claims based upon treaties, and, in considering the scope and manifest purpose of the later act in relation to claims arising out of transactions between the Government, or its officers, and claimants, we find no warrant for concluding that in enlarging the jurisdiction previously conferred by § 1059 it was the intention of Congress to effect such a complete substitution as would destroy the established exception set forth in § 1066. So far, then, as the petition may be viewed as one seeking to assert a claim growing out of the treaty with Spain, we are of the opinion that it was not within the jurisdiction of the Court of Claims.

It is insisted, however, that the claim should not be treated as one dependent upon a treaty stipulation (*United States* v. *Weld*, 127 U. S. 51, 57), that the treaty merely serves to confer upon the United States the title to the Philippine Islands (December 10, 1898, 30 Stat. 1754; November 7, 1900, 31 Stat. 1942); and that the claim is based upon considerations of international law. It is pointed out that it was stated in the protocol that an article proposed for the assumption of contracts which had been entered into by the Spanish Government was rejected by the American Commissioners, while it was also set forth that it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of international law (Sen. Doc. No. 62, 55th Cong. 3d Sess., pp. 240, 241). But, if the claim of the appellant were deemed to rest exclusively upon the transfer of sovereignty, upon the theory that thereby under the principles of international law an obligation in its favor was imposed upon the United States, the claim would still, in our judgment, be excluded by the statute from the consideration of the court below. The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed. It is its evident purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims.

But the petition has another aspect. The grant to the appellant, as already stated, provided in Article 16 for a payment of a tax of ten per cent. and, under Article 17, for precedence and half rates in the transmission of official

despatches. It is argued by the appellant that the fact that the United States "has received and is receiving the special tax" and "the precedence and half rates specified" must be regarded as admitted; and it is urged that under the general principles of jurisprudence the facts set forth in the petition import an obligation on the part of the United States to the appellant to pay the subsidy provided for in the concession so long as the United States shall continue to avail itself of the rights and privileges which have accrued to it under the terms of the concession.

If the petition can be fairly said to present the claim that the United States, not simply by virtue of succession to sovereignty under the treaty of cession, but through its subsequent transactions with the appellant, and by contract to be implied from such transactions, has become indebted to the appellant, we think that the claim, as thus limited, would be within the jurisdiction of the court below under the act of 1887. It is true that the averments of the petition lack definiteness. It is not specifically alleged that the United States has received the tax or enjoyed the benefit of the half rates, nor is it precisely stated what transactions have been had between the Government and the appellant. But the petition alleges that the United States, since it entered into the occupancy of the Islands, has "availed itself of all the benefits and advantages" of the submarine cable and telegraph lines established by the appellant, "using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do," and that "it has become in all respects the successor of the Government of Spain to all rights, privileges and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concession." These general allegations are not altogether inapposite with respect to a claim based upon an implied contract outside of the treaty itself,

and the claimant should not be denied the right to have its claim, thus considered, adjudicated. In this view, the petition would be susceptible of amendment and its sufficiency, in law and fact, could be heard and determined.

We express no opinion upon the merits of the claim, in this aspect, as they are not before us, the court below having declined to take jurisdiction. But as we think there was jurisdiction to pass upon the claim under the limitations above stated, the judgment will be reversed and the cause remanded with instructions to the court below to take further proceedings in conformity with this opinion.

It is so ordered.